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A TREATISE

ON THE

LAW AND PRACTICE

OF

VOLUNTARY ASSIGNMENTS

FOR THE

BENEFIT OF CREDITORS;

ADAPTED TO THE LAWS OF THE VARIOUS STATES.

WITH AN

APPENDIX OF FORMS.

BY

ALEXANDER M. BURRILL,

AUTHOR OF A LAW DICTIONARY AND GLOSSARY, A TREATISE ON CIRCUMSTANTIAL EVIDENCE, AND A TREATISE ON PRACTICE, ETC.

THIRD EDITION.

REVISED AND ENLARGED BY JAMES L. BISHOP.

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BY GEORGE L. STERLING,

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PREFACE TO THE FOURTH EDITION.

Since the publication of the previous edition of this work, the Bankrupt Act has been repealed, and the system of voluntary assignments, with various modifications, now prevails to a greater extent than before throughout the United States. One may almost say that every new volume of reports contains at least some case bearing upon the questions treated in this book.

In preparing the fourth edition, no alterations have been made in the arrangement of the matter, and none of importance in the text except where statutes have rendered a change necessary. About seventy-five pages of new matter, scattered through the volume, have been added, however, and nearly eight hundred new cases.

The various State statutes, many of them recent and lengthy, have not been set out in full from lack of space, but it is hoped that enough has been given to furnish a reliable guide, and suggest to the reader the points to be observed and looked for in the statutory regulations affecting voluntary assignments.

G. L. STERLING.

New York, November 1, 1882.

PREFACE TO THE THIRD EDITION.

Mr. Burrill's "Treatise on Assignments" is well known to the profession as a work of a high order of merit, and requires at this time no formal introduction. The present edition, however, in which some changes have been made in the structure as well as in the substance of the work, may properly call for a few words of explanation. During the period which has elapsed since the appearance of the last edition—now nearly twenty years—the bankrupt law has been enacted, many statutes relating to voluntary assignments have been passed in the several States, and upwards of a thousand cases illustrating the questions discussed have been reported. The matter available in preparing a new edition was therefore extensive as well as important. The plan upon which the work was originally prepared by the learned author, included, in some instances, a very full discussion of the cases, with copious extracts from statutes, many of which have since been repealed or amended. Hence it was feared that mere notes of reference to the modifications and changes which have taken place in the law might prove unsatisfactory. The editor has, therefore, undertaken the delicate task of revising as well as annotating the text.

The design has been to make as few alterations in the language of the original work as possible, although in some instances, for the sake of brevity, the order of chapters, paragraphs, and sentences has been changed. Thus the first, third and twelfth chapters, which treated respectively of "assignments in general," "assignments distinguished from other modes and instruments of transfer," and "assignments directly to creditors," have been condensed into the first chapter. In like manner the fourth, sixteenth and twenty-ninth chapters of the original, treating of "what may be assigned," "the amount assigned," and "what passes by an assignment," are here found under the sixth chapter, entitled "of the assigned property." So the ninth, eighteenth and nineteenth are here condensed into one chapter, treating of the "form of the assignment."

A new chapter, on voluntary assignments considered in connection with the bankrupt law, has been added, and it should here be remarked, that several important cases touching upon the questions

discussed in that chapter, but which have been reported since it was put in print, are to be found in the addenda of cases, at page 719. The chapter on the *lex loci* has been partially rewritten, in accordance with the intention of the learned author, and partly from notes left by him.

The perplexing questions which formerly arose in relation to preferences and releases, are now of little or no interest, and the portions of the work which treat of these subjects, have received the least attention, while the chapters which refer to the creation of the trust, and the duties of the trustee, have been more carefully considered.

The work has been, throughout, divided into sections with catch words, for convenience of reference.

The forms which are annexed are not expected to supply the wants of practitioners under the various State statutes, but are inserted rather as general guides. They have been selected, in every instance, from instruments which have stood the test of judicial criticism.

It was the desire of the editor to distinguish, in some suitable manner, the additions and alterations which have been made in this edition, lest any error or failure on his part should seem to mar the well-deserved reputation of the distinguished author for thorough accuracy and reliability; but the changes were necessarily so numerous, and of such a character, that no acceptable plan suggested itself, and the purpose was reluctantly abandoned. In presenting the edition in this form, therefore, the editor must justly be held responsible for any errors or shortcomings which appear in the following pages. The difficulties of the task will be apparent to the reader, and need not be dwelt upon. If the result shall prove in any degree serviceable at a time when attention is being universally recalled to the subject of voluntary assignments, all that was anticipated will have been accomplished.

J. L. B.

New York, January, 1877.

PREFACE TO THE SECOND EDITION.

Since the publication of the first edition of the following work, a large addition has been made to the number of adjudged cases on the subject of voluntary assignments; and many statute provisions affecting the form of these instruments, or the course of proceedings under them, have been either enacted, or brought for the first time, within the author's reach. The incorporation of this matter, comprising references to upwards of three hundred new decisions (chiefly American, and some of great interest and importance), has considerably increased the size of the volume; but, with the exception of a few portions which have been rewritten, the general arrangement of the subject has not been disturbed, and the number and order of the chapters remain as before.

In the course of the revision, the author has been favored with valuable contributions from members of the profession in this and other States, consisting of notes of new cases—some not yet reported—and references to or extracts or copies of late statutes, not otherwise accessible. For these, of which free use has been made, he takes this method of returning his acknowledgments.

It was intended to have materially enlarged the Appendix, by presenting, in full, all the statute provisions on the subject of voluntory assignments now in force in the several States. But in order to avoid delay in publication, this has, for the present, been omitted.

New York, September 21, 1858.

PREFACE TO THE FIRST EDITION.

The importance of the subject of voluntary assignments for the benefit of creditors, in a mercantile community like the United States, will hardly need any special remark by way of introduction to the following work. The frequency with which these transfers are resorted to, and the magnitude of the consequences which they often involve, render them matters of constant practical interest to the merchant and trader; while the importance of the principles by which they are regulated, and the great variety of questions to which they have given rise, impart to them a peculiar prominence as objects of professional attention and study. Of the law of voluntary assignments it may indeed be said, that it has been subjected in this country to so much modification, by legislative enactment and otherwise, as to have assumed, in many respects, a distinctively American character. Several of its leading principles, it is true (including some very important statutory provisions), have been borrowed from the law of England, and occasional illustrations and analogies have been and still are derived from the same source; but the great body of its rules, and much of what may be called its practice, have been established on quite independent grounds.

The difficulties by which the subject is or has been distinguished, claim a further word of remark in this place. The leading doctrines of this branch of the law of transfer have not been established without severe and repeated contests between the interests of debtor and creditor, which they so largely affect. In some of these contests, the considerations addressed to the courts have been so nearly balanced as to lead to conflicting decisions, even in the same State, leaving eminent judges sometimes at a loss to determine on which side lay the preponderance. In other States, the current of decisions, after having been for some time uniform in one direction, has gradually inclined in another, leading ultimately to quite opposite conclusions. The difficulties arising from these sources have been increased by the diversities always inseparable from the administration even of the same general system of laws by numerous independent tribunals; and, still further, by sectional differences growing out of long established modes of transfer peculiar to certain States. The right of a

debtor to give preferences to certain creditors over others, in an assignment of his property; his right to annex conditions to the assignment; to reserve benefits to himself or his family, or to reserve any control over the assignment, the assignee, or the property itself; the necessity of the assent of creditors to the validity of the transfer; the necessity of a delivery of possession of the assigned property—all prominent points in the law of assignments; together with the great question which may be said to comprise them all—what renders an assignment fraudulent and void against creditors?—have been, in a most emphatic sense, "vexed questions;" and some of them, to a considerable extent, still remain so.

The only work in which the principles of this branch of American law have been professedly treated and reduced to anything like a system,[1] is the "Summary" of Mr. Angell, which appeared in 1835. This was a very acceptable manual to the profession, comprehending, within a small compass, much valuable matter conveniently arranged. Since the date of its publication, however, the law of assignments has not only spread itself over a vastly wider field, but has assumed in many respects a new character. The very numerous decisions which have been made in the State and Federal courts, have not only established many new rules, but have materially modified some that had been previously settled. Another and more obvious feature of difference is presented in the *statutes* which have been enacted in several of the States, with express reference to voluntary assignments; settling some important principles of law affecting their form and operation, and regulating, often with minuteness, the practical course of proceedings under them.

Under these circumstances, a new work being called for, the present treatise was undertaken, not without hesitation on the part of the author, in view of the difficulties which have been mentioned. The subject seemed to require a mode of treatment which should present a view, first, of the principles constituting what may be denominated the general American law of voluntary assignments, combined with adequate references to the local law of the States; and, secondly, of the practice under these transfers—both being reduced, so far as the multifarious character of the materials would permit, to something like a uniform system possessing both general and local utility. The latter branch of the subject was wholly untouched by Mr. Angell, and has not hitherto been illustrated by any American writer. It

[1] The author does not here overlook the valuable note to the cases of Thomas v. Jenks and Grover v. Wakeman, contained in the first volume of the American Leading Cases, in which the latest law on the subject is digested in a clear and able manner.

has been found, however, to possess so much importance, that it has been principally had in view in the arrangement of the whole work.

The following pages present, it will be seen, not only a summary of the *principles* upon which voluntary assignments are constructed, and by which their operation is regulated, but also a historical view of the *proceedings*, in the order in which they occur in practice, from the first drafting of the instrument to the close of the trust created by it; thus placing before the reader, successively, first, the acts of the debtor in making and completing the assignment; secondly, the acts of the assignee in carrying it into effect; and lastly, the acts of the creditors in acceptance or rejection of the provision made by it.

In the treatment of the subject according to the plan here indicated, regard has been had not only to the convenience of practiced and professional readers, but to the wants of students and such non-professional persons as may consult the work. This will serve to explain what perhaps might otherwise be considered a too frequent reference to familiar rules, and repetitions of matter which might have been dispensed with. As to any omissions or misstatements which may be discovered, particularly in reference to the statute law of the States, the author relies on the indulgence of those whose familiarity with the subject best enables them to appreciate the difficulty of attaining at once entire fullness and accuracy, where the sources of information are numerous, and not always conveniently accessible.

The forms presented in the Appendix embrace examples of the principal varieties of assignments in most frequent use; and, it is hoped, will be found convenient as general guides to the draftsman, or as illustrations to the reader. They are not intended, however, to dispense with a constant reference to the rules laid down in the body of the work; and are, of course, always to be taken subject to modification by local law or usage. The collection might have been considerably extended; and it was the author's design, had time permitted, to have included examples of all the most important varieties of assignments in use throughout the United States. These will be supplied on a future occasion, should a revision of the work be found necessary.

NEW YORK, June 18, 1853.

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VOLUNTARY ASSIGNMENTS.

VOLUNTARY ASSIGNMENTS.

CHAPTER I.

ASSIGNMENTS IN GENERAL; VOLUNTARY ASSIGNMENTS FOR THE BENEFIT OF CREDITORS DEFINED AND DISTINGUISHED FROM OTHER MODES AND INSTRUMENTS OF TRANSFER.

§ 1. *Assignments in General.*—An *assignment* is a transfer or setting over of property, or of some right or interest therein, from one person to another; the term denoting not only the *act* of transfer, but also the *instrument* by which it is effected.[1] In these senses, the word is variously applied in law.[2] As applied to *real* estate, an assignment is properly a transfer, or making over to another, of one's whole interest in lands or tenements, whatever that interest may be;[3] but in England it is usually applied to express the

[1] These appear to be secondary senses of the term, the primary meanings being those of *appointment*, *allotment*, *specification*, or *designation;* all which are still retained. In the Latin of the old books it is termed *assignatio*, from which the Scotch *assignation* has been formed; but the word *assignment* itself is obviously taken from the Law French. Britt. cc. 34, 88, 103.

[2] An assignment is properly the transfer of one's whole interest in any estate; but it is now generally appropriated to the transfer of chattels, either real or personal, or of equitable interests. Watkins on Conv. b. 2, c. 9, p. 227.

The common-law definition of an assignment is "the transferring and setting over to another of some right, title, or interest in things in which a third party, not a party to the assignment, has a concern and interest." 1 Bac. Abr. 329. See Mr. Justice Isbell, in Cowles v. Ricketts, 1 Iowa, 582.

[3] The introduction of the word *assigns* into the old instruments of feudal conveyance, had the effect of conferring on the purchaser the power of alienation. Britt. c. 35; Mirr. c. 1, § 3; 2 Bl. Com. 289. Hence, the proper sense of assignment, in ancient conveyancing, seems to have been *alienation by virtue of a previous instrument.* This serves to account for the restriction of the term, which has so long prevailed in England, to the sense of the transfer of an *interest held under a previous conveyance;* the assignor creating no new estate by the assignment, but merely passing or setting over an estate already created, to be held as the assignor himself held it; the assignee being put in his place, or (in the ancient sense of the latter word) *deputed* for that purpose. See the next note.

transfer of an estate for life or years.[1] Considered as an instrument, an assignment at common law is a species of deed, and is classed, by Blackstone and other writers, among common-law conveyances of a secondary or derivative character, which also presupposes a conveyance precedent.[2] As applied to *personal* estate, the term *assignment* has the same double sense of the act and instrument of transfer. Where an article of merchandise or personal chattel is the subject of it, the act is more commonly termed a *sale*, and the instrument used to express and authenticate it, a *bill of sale*.[3] But in other cases of transfer, the term is usually employed to denote both the act and the instrument; the latter being either separately drawn in the form of a deed, or indorsed upon other instruments (such as bonds, policies, etc.), in shorter form; and in cases of transfer of bills of exchange and promissory notes, the assignment is still more compendiously expressed by the mere indorsement of the assignor's name.[4] In many cases, however, no instrument

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[1] 1 Steph. Com. 485. Sir William Blackstone defines an assignment to be "properly a transfer, or making over to another of the right one has in any estate; but it is usually applied to an estate for *life or years*." 2 Bl. Com. 326. Dr. Wooddesson restricts the proper meaning of the term to "the transfer of the interest which any one has in the unexpired residue of a term or estate *for years*." 2 Woodd. Lect. 170, 171. In Cruise's Digest, an assignment is said to be "properly a transfer of some particular estate or interest in lands, but it is usually applied to the transfer of a term *for years*." Cruise Dig. tit. xxxii (Deed), c. vii, s. 15. The reason of this peculiar restriction of the term to estates for years is to be found in the nature of those estates, which could not be adequately conveyed by a *new* instrument of the *same* kind (that is, the lessee or tenant for years could not convey or divest himself of the whole of his estate at once, by a new lease, as a feoffee might by a new feoffment, the idea of a lease implying a reversion of some kind to the lessor on its termination, and of course a continuing interest in the lessor to that extent), but only by setting over the *same* instrument, and the estate held under it. Hence the distinction, which has become so well established in modern law, between an assignment and a derivative or under lease. In American law, the term *assignment*, though constantly employed to denote the transfer of a leasehold interest, is not so frequently restricted to that particular sense.

[2] See 2 Bl. Com. 310, 324, 326.

[3] See 2 Steph. Com. 104; 1 Tucker's Com. (Laws of Virginia), [333] 323, note (a). The resemblances and distinctions between an assignment and a sale will be more fully noticed in § 4.

[4] The term *assignment* is here used in the larger sense of transfer in general. Chitty on Bills (Perk. ed. 1854), [5, 6] 8, [8] 11, 12, [196] 225; Story on Bills, § 17. In practice, however, the term, as applied to the transfer of bills and notes, is generally restricted to such as are not negotiable, as distinguished from the in-

or writing is used, the title to the property passing by mere delivery.[1] In mercantile transactions, the term *assignment* is not used in the sense of *sale*, but rather in contradistinction from it; being confined in its application either to transfers of a special kind, auxiliary to sales, or in completion of them (such as assignments of bills of lading, of policies of insurance, etc.), or to transfers by way of security for or in payment of *debts*. Indeed, in most of its applications, the term seems to imply the existence of the relation of *debtor and creditor;* and it is in this latter sense only that these modes and instruments of conveyance are now proposed to be considered.

§ 2. *Voluntary Assignments for the benefit of Creditors defined.*—Voluntary assignments for the benefit of creditors are transfers, without compulsion of law, by debtors, of some or all of their property to an assignee or assignees, in trust to apply the same, or the proceeds thereof, to the payment of some or all of their debts, and to return the surplus, if any, to the debtor.[2]

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dorsement of negotiable paper. Shankland, J., in Bump v. Van Orsdale, 11 Barb. 634, 639. In the case of the Bank of Marietta v. Pindall (2 Rand. 465), it was said, "The term *indorsement*, when applied to bills of exchange negotiable by the custom of merchants, or to paper made negotiable by our statutes, may, *ex vi termini*, import a legal transfer of the title. But as to bonds and notes not negotiable, the legal title to them passes by *assignment* only; and as to them, indorsement is not equivalent to assignment; as to them, *assignment* means more than indorsement—it means indorsement by one party with intent to assign, and an acceptance of that assignment by the other party." Cabell, J., Id. 475; see also, on this point, Jagoe v. Alleyn, 16 Barb. 580; Watson v. Bailey, 2 Duer, 509.

[1] The term *assignment* is frequently used in the books to express the transfer of a promissory note by delivery. Edison v. Frazier, 4 Eng. (Ark.) 219, 220; Jackson v. Heath, 1 Bailey, 355; Chitty on Bills (Perk. ed. 1854), 259, note 3, and cases cited ibid.; Hedges v. Sealy, 9 Barb. 214; Bump v. Van Orsdale, 11 Id. 634; Collins v. Knapp, 18 Id. 532; but see Calkins v. Packer, 21 Id. 275; and see Andrews v. Carr, 26 Miss. 577. In Feimster v. Smith (5 Eng. Ark. 494), the term, applied to a bond in pleading, was held to import delivery, *ex vi termini*. In Andrews v. Carr (*ub. sup.*) it was held that the words *transfer* and *assign* mean, in legal proceedings, a transfer by *writing;* and that when a party, in pleading, says that he acquired title to a note by assignment, he is understood to mean *written* assignment, unless he qualifies the meaning of the words.

[2] The definition given in the text is approved in Bartlett v. Teah, 1 McCrary, 176, 178. Under the Pennsylvania statute an assignment has been defined to be "a transfer by a debtor of the whole or a part of his effects to some person in trust to pay all of his creditors in like proportion, and to return the surplus, if any, to the debtor." Mr. Justice Lowrie, in Wiener v. Davis, 18 Penn. St. 333.

Assignments, in this restricted sense, are distinguished with reference to their subject-matter, as being of all or of part of the debtor's property.[1] The former are known as *general*[2] assignments, in distinction from *partial* assignments, by which term the latter are defined.

Such assignments are termed voluntary,[3] to distinguish them from such as are made by compulsion of law, as under statutes of bankruptcy and insolvency (the latter being sometimes termed *statutory* assignments), or by order of some competent court. Assignments, in the sense in which they are here employed, are usually resorted to by debtors who find themselves unable to pay their creditors in full, or the embarrassed state of whose affairs has compelled them to discontinue the transaction of business, and, in some instances, the provisions of the statutes[4] which have been passed by the State Legislatures, regulating and restricting the operation of such assignments, are confined exclusively to assignments made by insolvents or by persons in contemplation of insolvency; but the solvency of the debtor,

[1] This division of the subject will be found more precisely stated in Chap. VIII. "An assignment of all one's property for the benefit of all one's creditors is clearly a general assignment." Mr. Justice Bennett, in Dana v. Lull, 17 Vt. 390. "A general assignment must include substantially *all* a man's property; and a partial assignment must omit some substantial portion of the property, and cannot be made to rest upon a mere colorable omission." Mr. Chief Justice Redfield, in Mussey v. Noyes, 27 Vt. 474; Longmire v. Goode, 38 Ala. 577.

[2] In the case of The United States v. M'Lellan (3 Sum. 345), the designation of voluntary assignments, as being "for the benefit of creditors," was held to imply a conveyance to trustees for the benefit either of the creditors at large, or of some other creditors than the immediate grantees. Id. 354, 355; and see Smith v. Woodruff, 1 Hilt. 469.

[3] Manny v. Logan, 27 Mo. 528. This is quite a different application of the word *voluntary* from the technical sense in which it is frequently employed, viz., that of being *without consideration*, or without valuable consideration. In the latter sense, *voluntary* is sometimes used as synonymous with *fraudulent*, though in other instances it is distinguished. See Nunn v. Wilsmore, 8 Term. R. 521, 528, 529. Lord Mansfield, in Cadogan v. Kennett, Cowp. 432, 434, and in Doe v. Routledge, Id. 705, 711; 4 Kent's Com. [463] 510; 1 Story's Eq. Jur. § 353; 3 N. Y. Rev. Stat. (6th ed.) p. 145, § 4; and see Wells v. Treadwell, 28 Miss. 717; Lumpkin, J., in Clayton v. Brown, 17 Ga. 217, 222. Mr. Roberts has alluded to the unsettled meaning of the term *voluntary* in this application. Roberts on Fraud. Conv. 63, 65, 70, 71, 72, 400. Whatever may be the form or character of the instrument to operate as a general assignment it must proceed from the will and be the act of the debtor. Hence the transfer is defined as voluntary. Perry Ins. & Trust Co. v. Foster, 58 Ala. 502, 521.

[4] See these statutes referred to in Chap. II.

in his own estimation or in fact, will not, apart from statutory provisions, unless connected with other evidence of fraud, invalidate an assignment.[1]

Voluntary assignments for the benefit of creditors are in many respects peculiar to American law and practice,[2] and have in this country acquired a technical signification. They are frequently referred to by name in statutory enactments as well as in judicial discussions, and a somewhat more careful illustration of their characteristic features may be necessary to distinguish them from other instruments and modes of transfer to which they are in some respects analogous.

§ 3. *Assignments Distinguished—Conveyances directly to Creditors.*—A voluntary assignment for the benefit of creditors implies a trust and contemplates the intervention of a trustee.[3] Assignments directly to creditors, and not upon trust, are not voluntary assignments for the benefit of creditors.[4] Assignments may be made either to the whole body

[1] Ogden v. Peters, 21 N. Y. 23; see Livermore v. Northrop, 44 N. Y. 107. As to what constitutes insolvency, and the effect of solvency upon the right to make assignments, see Chapter IV.

[2] Grover v. Wakeman, 11 Wend. 187. For a history of the law of voluntary assignments, see Ludington's Petition, 5 Abb. N. C. 307.

[3] Cowles v. Rickett, 1 Iowa, 382; Dickson v. Rawson, 5 Ohio St. 218. And where a railroad company executed a lease of its property for a term of years, providing that the net earnings should be apportioned one half to the lessee and the other half to the payment of certain debts of the lessor, this was regarded as an assignment for creditors within the Pennsylvania statute. Mr. Justice Read, in delivering the opinion of the court, said: "We have here property, a trustee, a trust, and creditors of an insolvent company, who are to take under it." Mr. Justice Hare, in the same case, said: "The means employed would seem to me immaterial if the result were a transfer in trust, or a trust bottomed on a transfer; if, in short, the property ceased to be the debtor's without vesting directly and absolutely in his creditors, and remaining outstanding in the hands of a third person, who could not be compelled to render an account or to fulfil the duties imposed on him without recourse to the aid of equity." Lucas v. The Sunbury & Erie Railroad Co. 32 Penn. St. 458. If a conveyance places the property transferred beyond the reach of an execution and creates a trust for the benefit of creditors, it is an assignment within the meaning of the Pennsylvania statutes, without regard to its form. Corn Ex. Nat. Bank v. Philadelphia Trust, &c. Co. 11 Phila. 510.

[4] Claflin v. Maglaughlin, 65 Penn. St. 492; Beach v. Beston, 47 Ill. 521; Keen v. Preston, 24 Ind. 395; Harkins v. Bailey, 48 Ala. 377; Johnson v. McGraw, 11 Iowa, 151; Beans v. Bullett, 57 Penn. St. 221; Henderson's Appeal, 31 Id. 502; Banning v. Sibley, 3 Minn. 389; Griffin v. Rogers, 38 Penn. St. 382; Chaffees v. Risk, 24 Id. 432; Vallance v. Miners' Life Ins. Co. 42 Id. 441; Brooks v. Staton, 11 Reptr. 260.

of the creditors or to particular creditors, or they may be of all or of a part of the debtor's property; but unless a trust is thereby created by the assignor in favor of creditors, such conveyances are not within the class of instruments known as assignments for creditors.[1]

It is not essential, however, that a trustee should be named as such in the instrument.[2] And when the creditor undertakes, under an agreement with the assignor, to sell the property and apply the proceeds to the payment of his own and other debts of the assignor, and refund the surplus, he becomes a trustee and the transaction amounts to a voluntary assignment.[3]

Assignments of the whole of a debtor's property directly to the whole body of the creditors are rare in practice, although mentioned with approval in some judicial opinions.[4] The acts of taking possession of the property as-

[1] Whether it is so in trust, and the assignee or grantee such trustee, depends upon the question whether, by the terms of the instrument or by necessary implication, he is liable to account to the creditors for the property in his hands and for the manner in which he disposes of it. If a Court of Chancery at the instance of the creditor would compel him thus to account, the character of the transfer and his own possession are thereby determined. Dickson v. Rawson, 5 Ohio St. 218. In Wallace v. Wainwright, 87 Penn. St. 263, an instrument reciting the indebtedness of the subscribers to certain parties and assigning certain claims, &c., to third persons *in payment* of the creditors named, was held to be an assignment for the benefit of creditors. The intervention of the third persons in whom the legal title to the property was vested was held to create a trust for the creditors named.

[2] Burrows v. Lehndorff, 8 Iowa, 96. Mr. Ch. Justice Wright, in that case, remarked: "The fact that he (the debtor) appoints a trustee seems perhaps, in most instances, to fix conclusively the character of the transaction as a general assignment." In that case, the instruments by which the assignment were made were all mortgages, and therefore there was no trustee named; but this was not taken to be the reason why the instruments should not be regarded as an assignment; and see Dickson v. Rawson, 5 Ohio St. 218.

[3] Truitt v. Caldwell, 3 Minn. 364; Page v. Smith, 24 Wis. 368. And where a debtor made an absolute conveyance of all his property to one of his creditors in consideration of the grantees' paying certain other creditors, this was held to be a general assignment. Murphy v. Caldwell, 50 Ala. 461.

[4] This is the form of assignment for which Mr. Justice Nelson expressed his preference, in the case of Cunningham v. Freeborn (11 Wend. 240, 256, 257), in the following language: "I would hold a debtor in failing circumstances to pay or give security to his creditor or creditors directly, without the intervention of a trustee who is often the creature of the debtor, without interest or sympathy on behalf of the creditor. In this way the creditors would obtain the control of the fund the moment the debtor parted with it; and if favored creditors were preferred, they would be obliged to see to it that they took no more than was a fair security for their debts. They should not be permitted to justify their possession under the cover of trusteeship for others. Each creditor should be his own

signed, and applying it in satisfaction of the debts provided for, are such as cannot always be performed by the creditors personally, where they are at all numerous, but requires the intervention of an agent who thereby becomes, in most instances, a trustee for the creditors. In some cases the assignment itself expressly directs or authorizes the appointment of such agent or trustee by the creditors.[1] In others, the creditors agreed among themselves that one of their number shall act for the others.[2] A trust also would result for the debtor in the event of a surplus remaining after full satisfaction of the debts.

But provision by the method of direct transfer is more commonly made in favor either of a single creditor, or of a few selected creditors; and a debtor may, in this way, transfer all his property,[3] or a specific portion of it, or some single article or item.[4] Where the assignment is to a single

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trustee. If inconvenient for creditors personally to execute the trust, they could appoint a trustee in their place. This modification would have the effect to give the possession and control of the fund, in the first instance, to the creditors, or to a person appointed by them." In the case of Mussey v. Noyes, in the Supreme Court of Vermont (20 Vt. 462, 471), it was said by Chief Judge Redfield, that "assignments made directly to the creditors, so as to require them to name the trustee, and thus make him their man, instead of his being, as is too often the case, the mere creature of the assignor, are certainly entitled to the most favorable consideration of the courts."

[1] This was the case in Tompkins v. Wheeler (16 Pet. 106), the assignment giving to the creditors, or a majority of them, power to nominate and appoint an agent, attorney, or trustee, to carry the purposes of the instrument into full effect. It is to be observed, however, that the assignment in this case, though made directly to the creditors of certain specified classes, was expressly declared to be *in trust* for the payment of the debts.

[2] This was the case in Adams v. Blodgett, 2 Woodb. & Min. 238. The creditors agreed that one of them, in behalf of all, should go and take possession of the property which the debtor had agreed to assign. O. L. was selected for that purpose, and received from the debtor a written order to have the charge of all his property, books and notes, &c., and to dispose of them for the benefit of all his creditors. O. L. went accordingly and took possession. The court treated O. L. as a trustee for the creditors. In Lockhart v. Stevenson (61 Penn. St. 64), where a debtor in failing circumstances transferred his stock of goods to certain of his creditors who had previously made an arrangement to divide the proceeds among themselves, this was not regarded as an assignment for the benefit of creditors. The fact that there may have been a trust created among the creditors as to the distribution of the proceeds was not deemed material; the trust was not constituted by the assignor.

[3] Law v. Wyman, 8 N. H. 536; Barker v. Hall, 13 Id. 298; Henshaw v. Sumner, 23 Pick. 446; Sargent v. Webster, 13 Metc. 497; Peck & Co. v. Merrill, 26 Vt. 686.

[4] Leitch v. Hollister, 4 N. Y. 211.

creditor, or to a few selected creditors, and is made absolutely, and by way of full payment or satisfaction it is, of course, wholly divested of the character of a trust, and is in the nature of an ordinary conveyance or sale for valuable consideration.[1] But where it is made by way of security only, or where a larger amount of property is assigned than is supposed necessary to satisfy the debts to which it is applied, a trust as to any remaining surplus results from the nature of the security,[2] although no express provision to that effect is contained in the transfer. Indeed, the transaction in such case is regarded by the courts, whatever may be its form, as in legal effect only a mortgage, creating but a specific lien on the property assigned.[3]

§ 4. *Distinguished from Sales.*—A sale, as we have seen,[4] is in law a species of assignment (taking the latter word in its broadest sense), and the affinity between the two modes of conveyance is shown by the circumstance that the instruments by which both are evidenced have usually the same formal words of transfer, "assign, transfer, and set over." In some cases, assignments have been drawn

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[1] In the case of Dias v. Bouchaud (10 Paige, 445, 448, 461) the words "voluntary assignment" in the act of Congress of March 2, 1799, § 65, giving priorities to the United States in cases of insolvency, were held by the chancellor to mean an assignment of all the debtor's property, in trust, to pay debts, as contradistinguished from a mere *sale* of the property to a creditor, in payment of his debt, or the pledge or hypothecation of the property to a particular creditor, as a mere security in the nature of a *mortgage*. In the same case on appeal (Bouchaud v. Dias, 1 N. Y. 201, 204), the act was further held to have intended an assignment for the benefit of creditors in general, as distinguished from an assignment for the benefit of a single creditor. In the case of the United States v. M'Lellan (3 Sum. 345), it had been previously held by Mr. Justice Story, that a conveyance by a debtor known to be insolvent of all his property, to one or more creditors, in discharge of their own debts and liabilities, not exceeding the amount due to and payable by them, and not for the benefit of the creditors at large, or of any other creditors than the immediate grantees, is not a "voluntary assignment" for the benefit of creditors within the purview of the act of 1799, so as to be affected by the priority of the United States, unless it appear that it was made with the intent to evade the priority given by the act.

[2] Gardiner, J., in Leitch v. Hollister, 4 N. Y. 211, 216.

[3] Leitch v. Hollister, 4 N. Y. 211; Tompkins v. Wheeler, 16 Pet. 106; Peck & Co. v. Merrill, 26 Vt. 686, 691, where the cases are reviewed; Solomon v. Sparks, 27 Ga. 385; Potter v. McDowell, 31 Mo. 62; Dana v. Stamfords, 10 Cal. 269.

[4] *Ante*, p. 2.

in nearly the exact form of a bill of sale, with the feature of a trust superadded.[1] Assignments have been spoken of in judicial opinions as sales, the assignors as vendors,[2] and the assignees as purchasers;[3] and the terms *sale* and *assignment* are frequently applied indifferently to the transfer of choses in action.[4] But *assignments*, in the sense in which they will be considered in the present work, are clearly distinguishable from *sales*, not only in their occasion and object, but in their essential legal qualities and operation. Sales are transfers in the ordinary course of business; assignments commonly grow out of the embarrassments or suspension of business. A sale is usually for a consideration actually paid, or agreed to be paid, and created or passing simultaneously;[5] an assignment is in most cases for a consideration already executed, as for a precedent or subsisting debt. An important distinction between the two modes of transfer arises out of the character of a *trust*, which belongs to an assignment. A sale (in cases free from fraud) is, on delivery of the thing sold and receipt of the consideration, a complete transaction, passing absolutely and irrevocably all the seller's interest in the subject of it, without reversion or return under any circumstances. An assignment is likewise an absolute conveyance by which both the legal and equitable estate

[1] See Marbury v. Brooks, 7 Wheat. 556. An absolute bill of sale was called and treated as an assignment, in Beers v. Lyon, 21 Conn. 604; so, also, in Truitt v. Caldwell, 8 Minn. 364.

[2] See Foster v. Saco Manufacturing Co. 12 Pick. 451, 453.

[3] See the opinion of Story, J., in United States v. M'Lellan, 3 Sum. 345, 355; and see Hollister v. Loud, 2 Mich. 309. In this case, an assignee was considered by the court as a purchaser for a valuable consideration. See, also, Gates v. Lebaume, 19 Mo. 17; Wise v. Winer, 28 Id. 237; Hardcastle v. Fisher, 24 Id. 70; but see Pierson v. Manning, 2 Mich. 445, 453, *contra*.

[4] Hilliard on Sales, 338, 339.

[5] A sale is a transferring of property from one person to another in consideration of a sum of *money to be paid* by the vendee to the vendor. Long on Sales, 1. A sale has been defined to be "a contract between parties, to give and to pass rights of property for *money*, which the buyer pays, or promises to pay to the seller for the thing bought and sold." Wayne, J., in Williamson v. Berry, 8 How. 495, 544.

A sale may be defined to be a transfer of the absolute or general property in a thing for a price in money. Benjamin on Sales (1st Am. ed.), p. 1. But the fact that a consideration is paid will not necessarily change the character of the transaction. Truitt v. Caldwell, 8 Minn. 364.

is divested out of the grantor, but the title vested in the assignee is subject to the uses and trusts in favor of the creditors,[1] and upon their satisfaction a trust results in favor of the assignor in the residue of the unappropriated property or its proceeds.[2] A transfer of specific property to a creditor in discharge of a pre-existing debt is in effect a sale.[3] An assignment of itself does not satisfy the claims of the creditors to any extent, but provides a method for raising the means with which to pay them.[4] Sales are often subject to covenants on the part of buyer and seller, from which assignments are free. An assignee is not liable to the payment of incumbrances to the same extent as a purchaser. The distinction between a *sale* and an *assignment*, in this particular, has been judicially declared in Pennsylvania. Thus, a conveyance of property by a debtor to two of his creditors, for the use of them and others, in consideration that they would release him, was held to be not a *sale*, but an ordinary *assignment* for the benefit of creditors, the debtor having a resulting interest in the surplus; and the creditors were held to be not liable to pay off a subsisting incumbrance beyond the amount realized from the property assigned.[5] In a case in the Court of Appeals of

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[1] Dwight v. Overton, 35 Tex. 390. The assignor and those claiming under him have no right, legal or equitable, in the assigned property until the purposes of the trust are satisfied. Briggs v. Davis, 21 N. Y. 574; s. c. 20 N. Y. 15. In this application the word has its full original meaning already noticed. See *ante*, p. 1, note 1.

[2] In re Potter, 54 Penn. St. 465.

[3] Johnson v. McGraw, 11 Iowa, 151; Hawkins v. Bailey, 48 Ala. 377; Claflin v. Maglaughlin, 65 Penn. St. 492; Lockhart v. Stevenson, 61 Id. 64; Keen v. Preston, 24 Ind. 395; and see Beach v. Bestor, 47 Ill. 521.

The fact that the consideration of the sale is to be applied in part to the payment of other debts than those of the vendee does not render the transaction an assignment for the benefit of creditors. Johnson v. McGraw, *supra;* Beach v. Bestor, *supra;* Beans v. Bullitt, 57 Penn. St. 221; Wilcoxson v. Annesley, 23 Ind. 285; see Murphy v. Caldwell, 50 Ala. 461.

[4] Bebb v. Preston, 1 Iowa, 460.

[5] Blank v. German, 5 Watts & Serg. 36. The conveyance in this case was in the form of an ordinary deed, but it was executed in pursuance of a prior written agreement on the part of the debtor to convey the property, subject to a full release; and on the part of the creditors to release the debtor, provided he could convey for certain uses. Both instruments were taken together as constituting one transaction, and as amounting to a trust for creditors.

New York,[1] an assignment of real estate by a religious corporation was construed to signify a *sale*, within the meaning of the charter, although the court seem to have been willing to concede that the assignment was not, strictly speaking, a sale, in consequence of the equitable interest which the assignors still retained in the application of the avails of the lands.

§ 5. *Distinguished from Agencies.*—A revocable power of attorney to collect debts and apply the proceeds does not amount to an assignment for the benefit of creditors, for the reason that there is no transfer of the title of the property.[2] Something more than a mere transmission of the custody and management of the assigned property is essential to constitute such an assignment. Thus where a railroad company, having received certain State aid bonds, transferred them to a trustee to be distributed among such of its creditors as would accept them in payment at 95 cents on the dollar, and provided for the return to the company of such of the bonds as should not be disposed of before a specified time, this did not create an assignment for the benefit of creditors, but simply an agency for a particular purpose.[3]

§ 6. *Distinguished from Mortgages.*—A mortgage resembles an assignment more closely in the leading features of being a security or provision for debt, and in involving a

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[1] De Ruyter v. St. Peter's Church, 3 N. Y. 238, 242; see Crawford v. Kirksey, 55 Ala. 282.

[2] Beans v. Bullitt, 57 Penn. St. 221; Henderson's Appeal, 31 Id. 502; Griffin v. Rogers, 38 Id. 382; but see Watson v. Bagaley, 12 Id. 164; and Wallace v. Wainwright, 87 Id. 268; McHose v. Dutton, 55 Iowa, 728; Murphy v. Caldwell, 50 Ala. 461. Where by consent of his creditors, a failing debtor was allowed to continue his business, under the supervision of a committee of the creditors, for a limited time, and a cashier or clerk was also appointed to receive and pay out money, the business to be done in the debtor's name, as before, until the state of his affairs could be ascertained, and the property of the debtor never came into the possession of the committee, who merely acted in an advisory manner and the cashier as a clerk, it was *held*, that the committee and cashier were not trustees as to the property of the debtor for the benefit of creditors and consequently were not liable to such creditors. Hall v. Crane Co., 87 Ill. 283.

[3] Banning v. Sibley, 3 Minn. 389.

resulting interest to the grantor on a certain contingency. And this affinity has been noticed and acted upon in several judicial decisions. In the case of Tompkins v. Wheeler,[1] in the Supreme Court of the United States, the conveyance, which was directly to creditors of certain classes, in trust to pay debts, is called a general "assignment or *mortgage*." In the case of Leitch v. Hollister,[2] in the Court of Appeals of New York, an assignment of a chose in action to certain creditors for the purpose of securing their demands, was considered as, in legal effect, a mortgage. In the later case of Curtis v. Leavitt,[3] in the same court, deeds of trust executed by a banking company to trustees for the purpose of obtaining money upon certain bonds issued by the company, were considered by the court as, in fact, mortgages given to secure the payment of money.[4] The vital distinction between an assignment for the benefit of creditors and a mortgage is clearly pointed out in the case of Briggs v. Davis[5] in the same court. An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment.[6] It does not create

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[1] 16 Pet. 106.

[2] 4 N. Y. 211. Gardner, J., speaking of the assignment in this case, observes as follows: "The conveyance, whatever may be its form, is in effect a mortgage of the property transferred. A trust as to the surplus results from the nature of the security, and is not the object, or one of the objects of the assignment. Whether expressed in the instrument or left to implication is immaterial. The assignee does not acquire the legal and equitable interest in the property conveyed, subject to the trust, but a specific lien upon it." Id. 216.

[3] 15 N. Y. (1 Smith), 9.

[4] Brown, J., Id. 143. Paige, J., Id. 206, 207. Comstock, J., seems to have taken a different view. Id. 126.

[5] 21 N. Y. 574; s. c. 20 N. Y. 15.

[6] State v. Benoist, 37 Mo. 500; Fromme v. Jones, 13 Iowa, 480; Vallance v. Miners' Life Ins. Co. 42 Penn. St. 441; McBroom & Wood's Appeal, 44 Id. 92; Lawrence v. Nuff, 41 Cal. 566; Dana v. Standfords, 10 Cal. 269; Dunham v. Whitehead, 21 N. Y. 131; McClelland v. Remsen, 3 Abb. Dec. (N. Y.) 74; Van Buskirk v. Warren, 4 Id. 457. The text is quoted with approval in Crow v. Beardsley, 68 Mo. 435; also in Bartlett v. Teah, 1 McCrary, 176. In State Bank v. Chapelle, 40 Mich. 447. Campbell, C. J. says: "We do not think the questions applicable to general assignments have any bearing on a security which is only intended to secure a single debt on specific property. This is equally true when the security is in favor of several creditors but is on a portion only of the debtor's property. Palmer v. Mason, 42 Mich. 146. See Parsell v. Thayer, 39 Id. 467.

a lien in favor of creditors upon property which in equity is still regarded as the assignor's, but it passes both the legal and the equitable title to the property absolutely beyond the control of the assignor. There remains therefore no equity of redemption in the property,[1] and the trust which results to the assignor in the unemployed balance does not indicate such an equity.[2]

In Ohio, a mortgage given to a creditor to secure the debt of any other creditor besides himself, has been held to be an assignment within the provisions of the act of 1838, relating to assignments by insolvent debtors, and the mortgagee to be a trustee for all the creditors.[3] In the same State, a chattel mortgage executed in contemplation of insolvency to a particular creditor, for the purpose of preferring him, was held to be an assignment of property in trust, and the mortgagee was deemed a trustee for all the creditors.[4]

§ 7. *Distinguished from Mortgages — Illustrations.* — The distinction between voluntary assignments in trust for creditors and mortgagees has been declared in several adjudged cases. Thus, in Pennsylvania, mortgages to secure debts have been held not to be within the act of March 24, 1818,

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[1] "If this were otherwise, and if the estate of the trustee were regarded as in the nature of a lien, and subsequent conveyances, mortgages or judgments against the assignor were considered analogous to conveyances of or liens upon an equity of redemption, it would follow that the trustees could not convey an irredeemable title to the lands assigned until they had foreclosed the rights of subsequent parties. This is not the effect of a valid trust to sell lands. For the purposes of sale in execution of the trust, the grantor of the trust and those holding derivative titles under him are entirely disregarded, and their interests are subject to the execution of the trust, not in the sense in which a junior mortgage is subject to a prior one, but absolutely. These parties have no rights, legal or equitable, until the purposes of the trust are satisfied." Mr. Justice Denio, in Briggs v. Davis, 21 N. Y. 576.

[2] Quoted with approval, Crow v. Beardsley, 68 Mo. 485.

[3] Bloom v. Noggle, 4 Ohio St. 45; Harkrader v. Leiby, Id. 602.

[4] Brown v. Webb, 20 Ohio (Lawr.), 389. Under the act of 1853 (1 Rev. Stat. of Ohio [S. & C.], p. 713), *all* transfers, conveyances or assignments, made with intent to hinder, delay and defraud creditors, inure to the equal benefit of all creditors, and having been adjudged fraudulent, the property so conveyed is administered by the court, by an assignee appointed by it, "as in other cases of assignments to trustees for the benefit of creditors." See Thomas v. Talmadge, 16 Ohio St. 433.

requiring deeds of assignment to be recorded within thirty days.[1] In the same State it has been held that a mortgage limited to a trustee, with power to sell for the payment of the debt secured by it, was not a voluntary assignment for the benefit of a creditor or creditors, such as must be recorded within the period prescribed by the statute provided for such a case.[2] In Massachusetts, instruments called bills of sale, but which in reality were mortgages, have been held not to be conveyances in trust for creditors under the statute of 1836, c. 238.[3] In the same State a mortgage, in the form of a deed with a defeasance, has been held not to be an assignment in trust for creditors.[4] In New Hampshire, a mortgage by the debtor of all his property to secure the payment of a part of his debts, leaving others unprovided for, was held to be not an assignment within the meaning of the statute of July 5, 1834, entitled "An act for the equal distribution of property assigned for the benefit of creditors."[5] In Connecticut, a mortgage by a debtor, of real estate, to certain creditors to secure them for indorsements, was held to be neither an assignment nor a conveyance nor in trust for creditors, within the meaning of the

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[1] Ridgway v. Stewart, 4 Watts & Serg. 383, 391. The mortgage in this case contained words expressive of a trust, and was held by the court below to be an assignment for the benefit of creditors. But their judgment was, on appeal, reversed; the Supreme Court (Kennedy, J.) holding that the assignments required by the act of 1818 to be recorded were those *absolute* transfers made by debtors in embarrassed or insolvent circumstances, of their estates to trustees for the benefit of their creditors, that is, for the purpose of being turned into money, and applied by the trustee to the payment of the debts owing by the assignors. See Lill v. Brant, 6 Ill. App. (Bradw.) 366.

[2] Manufacturers' and Mechanics' Bank v. Bank of Pennsylvania, 7 Watts & Serg. 335. The conveyance in this case was contended to be not a mortgage, but an assignment in trust to pay a particular creditor. But the court observed: "It is clearly a mortgage limited to a trustee in fee with a power to sell, and the statute has regard not to a conditional conveyance which may revest the property in the debtor, but to an absolute assignment to sell and pay at all events." Gibson, Ch. J., Id. 343. A mortgage was distinguished from a trust deed in the case of Hewitt v. Hullins, 11 Penn. St. 27; see also McBroom & Wood's Appeal, 44 Id. 92; Vallance v. Miners' Life Ins. Co. 42 Id. 441; Diesbach v. Becker, 34 Id. 152; Claflin v. Maglaughlin, 65 Id. 492.

[3] Henshaw v. Sumner, 23 Pick. 446.

[4] Marden v. Babcock, 2 Metc. 99.

[5] Barker v. Hall, 13 N. H. 298; and see Low v. Wyman, 8 Id. 536; and see Danford v. Denny, 25 N. H. 155.

statute of 1828.[1] In Vermont, a transfer by a debtor of all his property directly to certain creditors, for their benefit, was held to be not a general assignment in trust, under the act of November 1, 1843, but a mortgage or pledge of the property.[2] In Georgia, a mortgage given to secure a just debt was recently held to be not within the statute of 1838, "to prevent assignments," &c.[3] In Virginia, where a conveyance of real estate was made to a creditor in trust to satisfy his own demand, it was held that such conveyance was not to be considered as a deed of trust, but as a mortgage, to which the right of redemption was incident.[4] And in a case in the Court of Chancery of New York,[5] a voluntary assignment was distinguished both from a sale to a creditor, and a pledge of property in the nature of a mortgage.[6]

§ 8. *Distinguished from Deeds of Trust in the nature of Mortgage.*—Still more similar in form are deeds of trust

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[1] Bates v. Coe, 10 Conn. 280.

[2] Peck v. Merrill, 26 Vt. 686; McGregor v. Chase, 37 Id. 225; see Gage v. Chesebro, 49 Wis. 486, where an instrument is held to be a chattel mortgage rather than an assignment.

[3] Lavender v. Thomas, 18 Ga. 668, 675, and cases cited ibid.; Solomon v. Sparks, 27 Ga. 885. See Code of Ga. (1873), § 1954.

[4] Showning v. Cox, 1 Rand. 306.

[5] Dias v. Bouchaud, 10 Paige, 445, 448, 461; and see Briggs v. Davis, 21 N. Y. 574; s. c. 20 N. Y. 15; Dunham v. Whitehead, 21 N. Y. 131; McClelland v. Remsen, 3 Abb. Dec. (N. Y.) 74; Van Buskirk v. Warren, 4 Id. 457.

[6] In the case of Perry Ins. Co. v. Foster, 58 Ala. 502, the grantors were insolvent at the time of giving the conveyance, and executions were in the hands of the sheriff. To enable the grantors, who were planters, to make their crop, the company appellant agreed to pay the older judgments and advance money. A deed of trust was thereupon executed to secure the money to be advanced, and the amount of the judgment, the grantors agreeing to cultivate the plantation for the season, and deliver the crops to the trustees. The judgments were to be kept alive, and the surplus, if any, to be paid over to the grantors. Other creditors attacked this transaction as intended to hinder, delay and defraud creditors; or they claimed that, if the conveyance was not fraudulent, yet taken in connection with the contemporaneous transfer, to the preferred creditors, of judgments against the grantors, executions on which were a lien on all their estate, it was a general assignment, under the statute, inuring to the equal benefit of all the creditors. *Held*, That the conveyance was technically an assignment. "The entire estate in the property designated, legal and equitable, is conveyed to the trustees, and all that remains to the grantors is a resulting trust,"—citing the text; and see Crawford v. Kirksey, 55 Ala. 282; s. c. 50 Id. 590.

to secure the payment of particular debts.[1] Such instruments are both in law and equity substantially the same as mortgages, and the radical distinction between them and assignment for the benefit of creditors exists, as in the case of mortgages, in the equitable interest which the grantor still retains in the assigned property.[2] Frequently, especially in the Southern States, assignments for the benefit of creditors are referred to under the designation of deeds of trust. In most of these States, indeed, assignments in trust are frequently employed for a double purpose—ultimately, as modes of provision for the *payment* of debts, but intermediately, as instruments of *security* against default of payment by the debtor.[3] Hence they are, in many cases, drawn with a condition that, if the grantor pay the debt provided for within a specified time, the trustee shall reconvey to him the property,[4] or that the deed shall thereupon be void;[5] or *e converso*, that if the debtor do not pay the debt by a day named (called the "law day"),[6] the trustee shall sell the property and apply the proceeds in payment.[7] And special deeds of trust with such conditions are frequently made directly and exclusively to particular creditors, which gives them still more of the character of a mortgage.[8] They are, in fact, mortgages with the qualities of an assignment in

[1] Perry on Trusts, 602 *et seq.*

[2] Wilson v. Russell, 13 Md. 495; Fouke v. Fleming, 13 Id. 392; Sanderson v. Stockdale, 11 Id. 573; Pettie v. Johnson, 15 Ark. 60; but see Hannah v. Carrington, 18 Ark. 85; Lyons v. Field, 17 B. Mon. (Ky.) 543.

[3] They are called "deeds to secure the payment of money," in Stine v. Wilson, 10 Miss. 75.

[4] Hafner v. Irwin, 1 Ired. L. 490.

[5] Billups v. Sears, 5 Gratt. 81; Reynolds v. The Bank of Virginia, 6 Id. 174; Cornish v. Dews, 18 Ark. 172.

[6] Lanier v. Driver, 24 Ala. 149; see Bates v. Coe, 10 Conn. 280.

[7] Hill v. Manser, 11 Gratt. 522; Farmers' Bank v. Douglas, 11 Smed. & M. 469; Hopkins v. Lacontre, 4 La. 64; Elmes v. Sutherland, 7 Ala. 262; and see Warren v. Lee, 32 Id. 440; Magee v. Carpenter, 4 Id. 469; Hamphill, J., in Crosby v. Huston, 1 Tex. 203, 241, 242; but see Dwight v. Overton, 35 Tex. 89. The text is quoted with approval, in Crow v. Beardsley, 68 Mo. 435, 438, where it is said that the distinction is that an assignment is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. 18 Ohio St. 216.

[8] Burgin v. Burgin, 1 Ired. L. 453; Harris v. DeGraffenreid, 11 Id. 89.

trust superadded, or assignments to take effect at a future day.[1]

[1] See the observations of Pearson, J., in Stimpson v. Fries, 2 Jones' Eq. 156. These instruments, however, are not exclusively peculiar to the Southern States. In Hendricks v. Robinson (2 Johns. Ch. 283), the assignments, which were directly to certain creditors, had a proviso that, if the debts and engagements secured by them were paid within a certain time, the assignments should be void; otherwise the assignees were to sell the property and apply the proceeds. And in an English case in the court of bankruptcy, the assignment, which was of all the trader's property, directly to a creditor, contained a similar proviso with a further stipulation that, until default in payment, the assignor should retain possession of the property assigned. Deeds of this character are spoken of by the court, in this case, as being "now of very frequent occurrence," but as seeming to have a tendency "directly opposed to the spirit and policy of the bankrupt laws." Ex parte Harvey in re Collins, 1 Bankr. & Insolv. R. 194, 197. In the Ohio case of Hoffman v. Mackall (5 Ohio St. 124), an assignment or unconditional deed of trust was distinguished from a deed of trust in the nature of a mortgage, in the following terms: "There is a manifest and well-settled distinction between an *unconditional deed of trust* and a *mortgage* or *deed of trust in the nature of a mortgage*. The former is an *absolute* and *indefeasible* conveyance of the subject-matter thereof, for the purpose expressed; whereas the latter is *conditional* and *defeasible*. A mortgage is the conveyance of an estate, or pledge of property, as security for the payment of money or the performance of some other act, and conditioned to become void upon such payment or performance. A deed of trust *in the nature of a mortgage* is a conveyance in trust *by way of security*, subject to a condition of defeasance, or redeemable at any time before the sale of the property. A deed conveying land to a trustee as mere collateral *security* for the payment of a debt, with the condition that it shall become void on the payment of the debt when due, and with power to the trustee to sell the land and pay the debt, in case of default on the part of the debtor, is *a deed of trust in the nature of a mortgage*. By an absolute deed of trust the grantor parts *absolutely* with the title, which vests in the grantee unconditionally, for the purpose of the trust. The latter is a conveyance to a trustee for the purpose of *raising a fund to pay debts*, while the former is a conveyance in trust for the purpose of *securing a debt* subject to a condition of defeasance." Woodruff v. Robb et al. 19 Ohio St. 216; 1 Hilliard on Mortgages, 359. The court accordingly held (Bartley, J.), in this case, that "where the grantor in a deed of trust makes it in contemplation of insolvency, and authorizes the grantee, after paying the expenses of the trust, to make a *pro rata* distribution of the proceeds of the trust property among the grantor's creditors, such deed is absolute, and the conveyance is to a trustee for the purpose of raising a fund with which to *pay debts*, as distinguished from a deed of trust in the nature of a mortgage to *secure debts*."

CHAPTER II.

THE RIGHT TO ASSIGN; STATUTORY PROVISIONS RESTRICTING THE RIGHT TO ASSIGN AND REGULATING THE OPERATION OF ASSIGNMENTS.

§ 9. *Debtor's Right to Assign.*—"It would seem," observes Mr. Chief Justice Marshall,[1] "to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others; and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law." The right to transfer is a necessary incident to the right of property itself, and rests on the same foundation with the absolute rights to acquire and enjoy;[2] and its exercise, where the subject of it is free from the claims of others, is placed under no other restriction than such as the general policy of the law has imposed.

Where, however, property has become subject to the rights and claims of others, and particularly where the relation of *debtor and creditor* has been created, it becomes just and reasonable that the general power of disposition should be so far restricted and qualified as that conveyances and assignments by the debtor, especially of the whole or greater part of his property, should not be employed as means of preserving it for his own use or benefit, or of unduly protecting it from the remedies of his creditors.

§ 10. *Fraudulent Conveyances — Bankrupt Law.* — In order to effect this object, two systems have been devised in England, and have, from that source, been introduced

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[1] Sexton v. Wheaton, 8 Wheat. 229, 242.

[2] 2 Kent's Com. [326] 377; Id. [328] 370; 1 Bl. Com. 138.

into the jurisprudence of the United States. The first consists of statutory provisions which simply declare conveyances by debtors in certain cases to be fraudulent and void, and subject the property conveyed to the claims and remedies of creditors, as if no conveyance had been made, but interfere no further with the debtor's affairs. The other system is a body of regulations under which the whole of a debtor's property is, on the commission of certain defined acts, taken at once out of his hands by the law, and disposed of for the general and equal benefit of the creditors. The first of these comprises the provisions of those statutes which are generally known as the *statutes of fraudulent conveyances*,[1] and which operate without distinction upon all persons making transfers of property; the second is the system of the *bankrupt laws*, which is more confined in its operation.

The effect of the bankruptcy laws upon the right to assign property for the benefit of creditors will be considered in a subsequent chapter.

§ 11. *Fraudulent Conveyances.*—The statutory provisions against fraudulent conveyances commenced in England as early as the reign of Edward III,[2] but were not fully matured until the time of Queen Elizabeth, in whose reign two statutes were passed—the 13 Eliz. c. 5, and 27 Eliz. c. 4—the former relating to creditors only, the latter to purchasers. The provisions of the 13 Eliz. c. 5, to which we shall confine ourselves, and which is still in force in England, have been generally adopted throughout the United States.[3] The preamble to this statute formally expresses its object to be—"For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, convey-

[1] Sometimes, though not with strict accuracy, called *statutes of frauds*.

[2] Stat. 50 Edw. III, c. 6; Crabb's Hist. Eng. Law (Am. ed. 1831), 274; Stat. 3 Hen. VII, c. 4; Crabb's Hist. 440; 2 Kent's Com. [440] 547; and see *post*, Chapter XXV.

[3] 2 Kent's Com. [440] 548; 4 Id. [463] 510; 1 Story's Eq. Jur. § 353; see Hamilton v. Russell, 1 Cranch, 309.

ances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels," &c.; "which feoffments, gifts, grants," &c., "have been and are devised and contrived of malice, fraud, covin, collusion, or guiles, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages," &c. And the statute itself proceeds to declare that "every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them," &c., made with such intent or purpose, shall be from thenceforth deemed and taken (as against that person or persons, their heirs, &c., whose actions, debts, &c., were or should be in anywise disturbed, hindered, delayed or defrauded) "to be clearly and utterly void, frustrate, and of none effect."[1] These provisions have been considered by the highest authority[2] to be only declaratory of the common law, which, in the opinion of Lord Mansfield,[3] was so strong against fraud, that it alone would have attained every end proposed by the statutes themselves. More will be said on this subject in another place.

§ 12. *Classification of Assignments—Special or Partial Assignments.*—In tracing the history of the practice of assignments by debtors, we find that they are, for the most part, reducible under three principal divisions: first, transfers of some *specific* article, or one or more descriptions of property, directly to some favored creditor, and for his exclusive benefit; secondly, transfers of *all* or the greater part of the debtor's property to one or more *pre-*

[1] For the statute in full, and also the statutes of the various States, see Bump on Fraudulent Conveyances, Appendix, pp. 583 *et seq.*; Roberts on Fraudulent Conveyances, pp. 2, 3; and see *post*, Chapter XXV.

[2] Co. Litt. 76 a, 290 b; Lord Mansfield, in Cadogan v. Kennett, Cowp. 432, 434; Marshall, C. J., in Hamilton v. Russell, 1 Cranch, 309, 316; Story, J., in Meeker v. Wilson, 1 Gall. 419, 423; Spencer, J., in Sands v. Hildreth, 14 Johns. 493, 498; 2 Kent's Com. [440] 548, note; Garland, J., in The United States v. The Bank of the United States, 8 Rob. (La.) 262, 402.

[3] Cadogan v. Kennett, Cowp. 434.

ferred creditors, either directly or through the medium of a trust; and, thirdly, transfers by formal deeds of trust, of *all* the debtor's property, for the benefit of *all* his creditors. All these descriptions of transfers have, at one time or other, been made the subjects of judicial investigation, and have been construed, by the courts in England and the United States, with reference either to the statutes against fraudulent conveyances or to the bankrupt laws, and, in some cases, with reference to both.

Assignments of the first description just mentioned, by which a debtor transfers some specific article of property, or some part of his effects, to one or more creditors, by deed or by mere delivery, and in the way of payment or security, when made by persons in solvent circumstances, and in a course of a trade or dealing, are in the nature of ordinary business transactions, and rarely give rise to questions of any kind. Where, however, the obligations of the debtor are large, and the portion of his means thus specially appropriated is considerable, and the rights of other creditors become thereby affected, and especially where the transaction is inconsistent with the prosecution of his business, or is expressly done with reference to or in contemplation of suspension, failure, or bankruptcy, questions frequently arise as to the validity of these special or partial assignments. In England, they have most commonly been tested by the bankrupt laws, under which they have in some cases been upheld, but more frequently avoided, as giving undue or fraudulent preferences, contrary to the spirit and policy of that peculiar system. The same rules have, for the most part, been adopted in the United States, in cases which have arisen under our bankrupt laws.[1]

[1] Under the present bankrupt law (§ 5128), in order to render a transfer void, certain facts must concur. The debtor must be insolvent, the transfer must be made with a view to give a preference to the creditor, the creditor must have reasonable cause to believe the person making the transfer to be insolvent, and that it was in fraud of the bankrupt act, and the transfer must be made within four (in cases of involuntary or compulsory bankruptcy, two, [§ 5130 a]) months before the filing of the petition by or against the bankrupt. Bump on Bankruptcy

In cases not within the bankrupt laws, these *special* or *partial* assignments have been construed by the English courts with reference to the common law, or the statute of fraudulent conveyances; and under these they have been more frequently sustained.[1] And in the United States, assignments of this class, made directly to particular creditors, where no bankrupt law was in force, have been in many instances declared valid;[2] and even in those States where preferences in general assignments have been expressly prohibited by statute, the prohibition has been held not to extend to transfers of particular portions of a debtor's property, directly to a creditor in payment of a debt.[3]

§ 13. *General Assignments.*—Assignments of the second and third descriptions above mentioned (and which may be distinguished as *general* assignments),[4] by which all or substantially all the debtor's property is appropriated for the benefit either of one or more preferred creditors, or of the

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(8th ed.), 792 *et seq.* and cases cited; Clark v. Iselin, 11 N. B. R. 337; Kohlsaat v. Hoguet, 5 N. B. R. 159; see Mays v. Fritton, 11 N. B. R. 229; s. c. 20 Wall. 414. As to preferences under the bankrupt acts of 1800 and 1841, see Ogden v. Jackson, 1 Johns. 370, 373; Locke v. Winning, 3 Mass. 325; Freeman v. Deming, 3 Sandf. Ch. 327; McAllister v. Richards, 6 Barr, 133; 2 Kent's Com. [532] 688; Jones v. Sleeper, 2 N. Y. Leg. Obs. 131

[1] Holbird v. Anderson, 5 Term R. 235; Estwick v. Caillaud, Id. 420.

[2] Seymour v. Wilson, 19 N. Y. 417; Towsley v. McDonald, 32 Barb. 604; McMahon v. Morrison, 16 Ind. 172; Hessing v. McCloskey, 37 Ill. 341. In the late case of Archer v. O'Brien (7 Hun, 146), Mr. Justice Brady states the rule as follows: "The creditor, when he discovers circumstances which would put a prudent man on inquiry, should, in the preservation of his own rights, seek the payment of his debt, the protection of his own property. Such a course is not only consistent with honesty, but is a duty which he owes to himself, the observation of which is sanctioned by the rules of law authorizing the preference which he obtains.

"To constitute a valid transfer by a debtor to his creditor, it is only necessary that three things should concur:

"1. That there was a valid subsisting indebtedness on the part of the vendor or assignor to him.

"2. That the property transferred was conveyed to secure the debt.

"3. That it was reduced to possession."

[3] The York County Bank v. Carter, 38 Penn. St. 446; Tillou v. Britton, 4 Halst. 120; Meredith Man. Co. v. Smith, 8 N. H. 357; Brown v. Foster, 2 Metc. 152; Eastman v. McAlpin, 1 Kelly, 157; Blakey's Appeal, 7 Barr, 449; Wilcox v. Kellogg, 11 Ohio St. 394; see *post*, Chapter XI.

[4] As to what are general assignments, see *post*, Chapter VIII.

creditors at large, comprise such as are made by debtors in declining or insolvent circumstances; and whenever brought within the application of the bankrupt laws, have almost uniformly been condemned by the English courts, on the ground of their inconsistency with the provisions or policy of those laws, and their tendency to defeat their leading objects.[1]

In cases not within the English bankrupt laws, assignments of all a debtor's property, whether in favor of particular creditors, or of all the creditors, have frequently been held valid.[2]

The general power to assign property in trust, in behalf and for the benfit of creditors, has always been recognized and approved in the fullest manner, both by the State and Federal courts, as well as by the most eminent American jurists.[3] The only checks and restrictions for a long time

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[1] See *post*, Chapter III.

[2] Inglis v. Grant, 5 Term R. 530; Nunn v. Wilsmore, 8 Id. 521; Goss v. Neale, 5 J. B. Moore, 19; Meux v. Howell, 4 East, 1; Pickstock v. Lyster, 3 M. & S. 371; approved in James v. Whitbread, 20 L. J. Rep. (N. S.) C. P. 217.

[3] "Every debtor has a legal right to assign property for the security of the debts due by him, and so far from such an act being reprehended by the law, it is justified and approved." Story, J., in Brown v. Minturn, 2 Gall. 557, 559. General assignments are spoken of by the same judge as "encouraged by the common law." Halsey v. Whitney, 4 Mason, 206, 210. "A conveyance in trust to pay debts, is a valid conveyance, founded on a good consideration." Kent, C., in Dey v. Dunham, 2 Johns. Ch. 182, 189. "It is settled that an insolvent debtor may at any time before his property becomes bound by any lien, assign it over to trustees for the benefit of all his creditors by an act made *bona fide*. The assignment is to be referred to an act of duty, attached to his character of debtor, to make the fund available for the whole body of the creditors." Kent, C., in Nicoll v. Mumford, 4 Johns. Ch. 522, 529. "The right of an insolvent debtor to make an assignment for the benefit of his creditors, before the property is bound by any lien, does not admit of question, provided it be *bona fide*." 2 Tucker's Com. [443] 432. "The right to make a general assignment of all a man's property results from that absolute ownership which every man claims over that which is his own." Marshall, C. J., in Brashear v. West, 7 Pet. 608, 614. Garland, J., in The United States v. The Bank of the United States, 8 Rob. (La.) 262, 404. "I think that where an assignment is for the benefit of all the creditors of the assignor equally and ratably, it must command the sanction of every enlightened tribunal. It is a practical enforcement of the maxim that equality is equity." Buckner, C., in Robins v. Embry, 1 Sm. & Marsh. Ch. 207, 258. See Malcolm v. Hall, 9 Gill, 177. And see the opinion of Bennett, J., in Hall v. Denison, 17 Vt. 310; and Ewing, J., in Vernon v. Morton, 8 Dana, 247, 251. Mr. Justice Field, in Mayer v. Hellman, 18 N. B. R. 440, "Whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding." Mr. Justice Buchanan, in The State v. The Bank of Maryland, 6 Gill & Johns. 217,

imposed on the exercise of this power, were the general ones afforded by the provisions of the statutes of fraudulent conveyances, and the exercise of the equity powers of courts in setting aside assignments on the ground of fraud. And even these checks and restrictions were not always rigorously applied in practice. The right to prefer one creditor over another in these conveyances, by priority of payment, which amounted in many cases to the absolute exclusion of a non-preferred creditor, was universally recognized;[1] and the debtor was usually allowed a large discretion in prescribing the terms upon which such preference, or indeed any benefit of the assignment should be enjoyed. The same liberality was extended to the execution of the trust, after its creation by the debtor; the powers of assignees not being very rigidly limited, nor their duties very carefully defined. The whole transfer, in short, was in many cases a private transaction between the debtor and his assignee, with little of the notoriety which its avowed object would seem to require; and, in its effect, has, not inaptly, been characterized as "a bankrupt law made by the debtor for himself."[2] The evils growing out of this system of assignment were occasionally noticed by the courts, and the increasing abuses of the power with which it armed the debtor, were at length strongly exposed in some able judicial opinions.

§ 14. *State Statutes.*—The attempt to correct these abuses has led in many States to the enactment of statutory regulations limiting, on the one hand, the debtor's power in creating these trusts, and defining, on the other, the duties of assignees in executing them; and at the same time giving to creditors a more effectual power of inspection and control over the acts and proceedings of both. It

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"Equality is equity, and when a debtor makes a transfer of his property for the fair purpose of equal distribution among his creditors, he does an honest act and discharges a moral duty." See Kalkman v. McEldeny, 16 Md. 60. Mr. Justice Bailey, in Hoffman v. Mackall, 5 Ohio St. 124; Forbes v. Scannell, 13 Cal. 242.

[1] The text is quoted with approval in Crawford v. Kirksey, 55 Ala. 282.

[2] Gibson, C. J., in Thomas v. Jenks, 5 Rawle, 221.

is obvious, from what has been said, that the power to make such assignments is not dependent upon these statutory provisions.[1] Assignments for the benefit of creditors are voluntary on the part of the debtor. No authority can exact them; and when made, they partake of the nature of a private contract. The assignee derives his authority entirely from the grantor; and the appointment carries with it an actual and not merely a theoretical trust and confidence. The assignee is the choice of the debtor to whom to intrust his property and his relations with his creditors. Under this view of the relation, we should not expect the legislature to go further than to regulate, direct, and secure a performance of the trust.[2] A general reference to the statutes of the several States may be found convenient, reserving a consideration of the details for their appropriate place in the course of the work.

§ 15. *Arkansas and Alabama.*—In the former of these States the legislation has been confined to provisions requiring the filing of an inventory and bond,[3] the presenting of an account by the assignee,[4] and the regulation of the time and mode of sale of the assigned property.[5] In the latter State, every general assignment by which a preference or priority of payment is given to one or more creditors over the remaining creditors of the grantor is declared to inure to the benefit of all the creditors of the grantor ratably,[6] and such

[1] Mr. Justice Sharswood, in Beck v. Parker, 65 Penn. St. 262; Cook v. Rogers, 13 N. B. R. 97; Bentley v. Thrasher, 59 N. Y. 649; s. c. 2 Supm. Ct. (T. & C.) 309; Dehner v. Helmbacher Mills, 7 Ill. App. (Brad.) 47.

[2] Drain v. Mickel, 8 Iowa, 438.

[3] Rev. Stat. of Ark. (ed. 1874), c. 10, § 385, p. 207; Act of Feb. 15th, 1859. See Clayton v. Johnson, 36 Ark. 406; Raleigh v. Griffith, 37 Id. 150; Thatcher v. Franklin, Id. 64; Bartlett v. Teah, 1 McCrary, 176.

[4] Rev. Stat. of Ark. (ed. 1874), c. 10, § 386.

[5] Ibid. § 387. An assignment which directs or allows the assignee to execute the trust and dispose of the property in a mode not authorized by the statute or contrary to its requirements, is void. Schoolfield v. Johnson, 11 Fed. Reptr. 297.

[6] Rev. Code of Ala. (1876), § 2126. The assignment will be held to inure to the benefit of all the creditors equally, at the instance of those who are not preferred, but, as between the parties themselves, the other creditors not interfering, it has effect and operation according to its term. Rapier v. Gulf City Paper Co., 64 Ala. 330; Lehman v. Tallassee Mfg. Co., Id. 567; see, also, Perry Ins. & Trust Co. v. Foster, 58 Id. 502; Murphy v. Caldwell, 50 Id. 461.

instruments are rendered fraudulent and void as to the creditors of the grantor, when any creditor provided for thereby is required to make any release or to do any other act impairing his existing rights before participating in, or receiving, the securities therein provided him.[1]

§ 16. *California.*—Previous to the enactment of the civil code of California,[2] all voluntary assignments by insolvent debtors for the benefit of creditors, were deemed void, as being included in the prohibition of the 39th section of the insolvent laws of that State.[3] Under the civil code, however, insolvent debtors are expressly authorized to execute assignments of property to assignee[4] for the satisfaction of their creditors, in conformity to the provisions therein contained, and subject to the requirements of the code relative to trusts, to fraudulent transfers, and to the restrictions imposed by law upon assignments by special partnership, by corporations, and by other specific classes or persons. The assignment is void against creditors not assenting if it gives a preference or tends to coerce a release or compromise, or if it provides for the payment of any claim known to the assignor to be false or fraudulent, or for the payment of more upon any claim than is known to be justly due, or if it reserves any interest in the assigned property, or any part thereof, to the assignor or for his benefit, before all his existing debts are paid, or if it confers upon the assignee any power which, if exercised, might prevent or delay the immediate conversion of the assigned property for the purposes of the trust, or if it exempt him from liability for neglect of duty or misconduct.[5] The statute likewise provides for the manner of executing the assignment, for the filing of an inventory and bond, and contains numerous provisions for the execution of the trust.

[1] Rev. Code of Ala. (1876), § 2125. [2] Approved March 21st, 1872.

[3] Act of May 4th, 1852, General Laws of Cal. (ed. 1870), § 3848; Forbes v. Scannell, 13 Cal. 242; Cheever v. Hays, 3 Cal. 471 (1853); Groschen v. Page, 6 Cal. 138 (1856).

[4] Title 3, part 2, § 3449, p. 541; as amended by acts of 1873–4; see acts amendatory of codes (1874); In re Temple, 6 Sawyer, 77.

[5] Ibid. § 3457.

§ 16a. *Colorado.*—In Colorado, by the Act of Feb. 12, 1881, it is provided that when an assignment for creditors is made, the assignee shall pay in full the claims of all servants, laborers and employes for wages accruing during the six months next preceding the date of the assignment, not exceeding fifty dollars to any one person. All the residue of the proceeds are required to be divided ratably, and every preference is declared void.[1]

§ 17. *Connecticut.*—In Connecticut the assignment law of the State, as embodied in the revision of 1849,[2] not only prohibited preferences in assignments by debtors in failing circumstances, in trust for the benefit of their creditors, but contained a variety of provisions regulating the manner of making such assignments, and of executing the trusts created by them. The act of 1853, entitled "An act for the relief of insolvent debtors, and for the more equal distribution of their effects among their creditors," as amended and contained in the revision of 1875,[3] has gone much farther, and has established a system resembling in principle the insolvent system of Massachusetts; under which, while insolvent debtors are still allowed to make assignments to trustees, as before the act, the execution of the trusts thus created is placed under the supervision of the court of probate having jurisdiction of the case; and the estates of such debtors are required to be administered upon, and settled in the manner provided by law for the settlement of insolvent estates.[4]

§ 18. *Delaware—Florida.*—In the former of these States,[5] any preference made in contemplation of insolvency in any assignment for the benefit of creditors, either under its provisions or otherwise, renders the assignment fraudulent and

[1] Laws of 1881, p. 85. Previous to this statute there was no statute in Colorado regulating assignments. Duggan v. Bliss, 4 Col. 223.

[2] Rev. Stat. (ed. 1849), p. 363, tit. 14, c. 4.

[3] Gen. Stat. (Rev. of 1875), p. 378.

[4] See Birdsey v. Vansands, 24 Conn. 176; Vansands v. Miller, Id. 180; Coggill v. Botsford, 29 Id. 439; Von Wettberg v. Carson, 44 Id. 287; Hull v. Sigsworth, 48 Id. 258; Shaw v. Smith, Id. 306.

[5] Revised Code of Delaware (ed. 1874), c. 132, § 4, p. 785.

absolutely void, and the estate and effects embraced therein are liable to be taken on execution or attachment as fully as if no such assignment had been made, and the person making such assignment is deprived of the benefit of any insolvent law of the State. Frauds and concealments in reference to the assigned property subject the assignor to punishment by fine and imprisonment.[1] By the act of March 18, 1875, the assignee is required, within thirty days after the execution of the assignment, to file an inventory of the property assigned. The chancellor is directed to appoint appraisers to appraise the property, who are to file their appraisement. The assignee must then give a bond in the amount of the appraised value of the estate. The assignee is required to account every year. He may be removed for cause by the chancellor. The general statutes of Florida contain no provisions relating specially to assignments for the benefit of creditors.[2]

§ 19. *Georgia.*—In Georgia preferences by general assignment to trustees were abolished (the assignments containing them being declared null and void, and fraudulent as against creditors) by the act of December 19, 1818,[3] entitled "An act to prevent assignments or transfers of property to a portion of creditors, to the exclusion and injury of the other creditors, of persons who fail in trade, or are indebted at the time of such assignment or transfer."

Under the code of Georgia,[4] preferences are not now invalid, nor do they invalidate the assignment. Sec. 1953 provides that a debtor may prefer one creditor to another, and to that end he may *bona fide* give a lien by mortgage or other legal means, or he may sell in payment of the debt, or he may transfer negotiable papers as collateral security, the surplus in such cases not being reserved for his own benefit

[1] Revised Code of Delaware (ed. 1874), c. 132, § 2. Laws of 1875, chap. 187.

[2] Florida Digest (ed. 1872).

[3] Prince's Digest (ed. 1837), p. 164.

[4] Code of Ga. (ed. 1873) p. 339; Act of 1865–6, p. 29; Rowland v. Coleman, 45 Ga. 204.

or that of any other favored creditor, to the exclusion of other creditors. The act of September 28, 1881, requires that the assignment should be accompanied by a sworn statement of assets, otherwise it is void.[1]

§ 20. *Iowa.*—The provisions of the act of 1857, c. 254, incorporated into the code,[2] render any general[3] assignment by an insolvent, or in contemplation of insolvency for the benefit of creditors, invalid, unless made for the benefit of all creditors in proportion to the amount of their respective claims. The act also provides for the filing of an inventory of the assigned property and the giving of a bond by the assignee, and subjects him to the orders of the court. It also provides for the determination of disputed claims, and contains other provisions in reference to the powers and duties of the assignee.

§ 21. *Illinois.*—Assignments for the benefit of creditors are now regulated by statute in this State.[4] Every provision of any assignment providing for a preference is declared void, and all debts within the provisions of the assignment are to be paid *pro rata.*[5] The assignment must be acknowledged and recorded. The debtor must annex an inventory of his property and creditors, and notice must be given to creditors to present their claims to the assignee. The assignee must file an inventory and valuation of the estate, and give a bond for the faithful performance of his duties. Provision is made for the proof and contesting of claims,[6] and for the final settlement of the accounts of the assignee. The assignee is, at all times, subject to the order and supervision of the county

[1] Laws of 1880–81, c. 846.

[2] Iowa Code (1873), tit. xiv, c. 7, §§ 2115–2128.

[3] A debtor may still pay or secure the claims of part of his creditors to the exclusion of others. Davis v. Cibbon, 24 Iowa, 257. He may make a partial assignment to certain creditors, with or without preferences. Lampson v. Arnold, 19 Id. 480; and see Farewell v. Howard, 26 Id. 381; Hutchinson v. Watkins, 17 Id. 475; Fromme v. Jones, 18 Id. 474, 480; Von Patten v. Burr, 52 Id. 518; Gray v. McCallister, 50 Id. 497.

[4] Rev. Stat. c. 72, §§ 637–50.

[5] Ibid, § 49.

[6] McCracken v. Milhous, 7 Ill. App. (Brad.) 169.

court,[1] and provision is made for the appointment by the court of another assignee in case of the death or failure of the assignee named in the assignment, to file the inventory and bond required by the act, and for the removal of the assignee for improper conduct.

§ 21*a*. *Indiana.*—In the State of Indiana,[2] however, an elaborate system prevails, in compliance with the provisions of which every general assignment must be made, or it will be deemed fraudulent and void. The assignment must be by indenture, signed, acknowledged and recorded, and must contain a full description of all real estate thus assigned, and be accompanied by a schedule containing a particular enumeration and description of all the personal property assigned, verified under the oath of the assignor. The assignee is required to file a copy of the assignment and inventory with the clerk of the Court of Common Pleas and make oath that he will faithfully execute the trust, and that the assigned property has been actually delivered into his possession. He is also required to give bonds. The act prescribes in detail the duties of the assignee in the administration of the estate, the sale of the property, and its distribution, and also provides for the removal and discharge of the assignee.[3]

§ 22. *Kansas—Kentucky.*—In the State of Kansas every voluntary assignment must be made for the equal benefit of creditors.[4] An inventory and bond[5] are required to be given and filed, and the proceedings on the collection and distribution of the estate are fully prescribed. By a further act, au-

[1] But courts of equity still have jurisdiction of a creditor's bill to set aside a fraudulent assignment or preference consummated before the making of the assignment. Strong v. Goldman, 8 Bissell, 552.

[2] Stat. of Ind. (Rev. 1881), §§ 2662–2683; Laws of 1859, p. 239; Laws of 1875, p. 166; Laws of 1881, p. 74.

[3] O'Neil v. Beck, 69 Ind. 239; Jackson v. Rounds, 59 Id. 116; Cravens v. Chambers, 55 Id. 5; Marsh v. Vawter, 71 Id. 22; Robbins v. Magee, 76 Id. 381; New v. Reissner, 56 Id. 118; Wright v. Thomas, 1 Fed. Reptr. 716; Davis v. Newcomb, 72 Ind. 413.

[4] Comp. Laws (Dassler), §§ 370–415.

[5] Under the act of February 27, 1860, the assignment was void unless the required bond was given. Dudley v. Whiting, 10 Kan. 47; Marshall v. Shibley, 11 Id. 114; Case v. Ingersoll, 7 Id. 367.

thority is given to the creditors to select an assignee to take the place of the assignee named in the instrument, and if the creditors fail to make choice of an assignee, or the assignee chosen fails to accept, the judge of the District Court, or in his absence the judge of probate, makes the appointment.[1] The assignee named in the assignment has no other power thereunder than the safe keeping and control of the property coming into his hands, and the delivery of the same to the assignee selected by the creditors. Under the general statutes of Kentucky, incorporating the provisions of the acts of 1856 and 1862,[2] assignments made in contemplation of insolvency, with the intent to give a preference, inure equally to the benefit of all creditors in proportion to the amount of their respective demands, including those which are future and contingent. All such transfers as are declared to inure to the benefit of creditors are subject to the control of a court of equity upon the petition of any person interested, filed within six months after the transfer is lodged for record or the delivery of the property transferred, and the court will compel the delivery of the property to a receiver, and its equal distribution among creditors.[3]

§ 23. *Louisiana—Maine.*—In Louisiana the laws in relation to the cession of property afford to debtors such facilities in giving up their property for the benefit of creditors, that there is little or no inducement in that State to make assignments; and the courts are rarely called upon to act on any but those made in other States.[4] In Maine, preferences in assignments were prohibited by the act of April 1, 1836.[5] By the act of March 21, 1844,[6] assignments were

[1] Laws of 1876, c. 101.

[2] Gen. Stat. of Ky. (1881), p. 490.

[3] Roberts v. Phillips, 11 Bush, 11; Linthicum v. Fenley, Id. 131; Whitehead v. Woodruff, Id. 209; Thompson v. Heffner, Id. 353; Ebersole v. Adams, 10 Id. 83; Cecil v. Sowards, 10 Id. 96; German Security Bank v. Jefferson, 10 Id. 326; Cogar v. Stewart, 1 Rod. (78 Ky.) 59.

[4] Garland, J., The United States v. The Bank of the United States, 8 Rob. (La.) 262, 404.

[5] Laws of Maine, 550, c. 761; Rev. Stat. (ed. 1841), p. 804, appendix; Pike v. Bacon, 21 Me. 280. This act has no force since the enactments of 1844, 1846 and 1849.

[6] Laws of 1844, p. 100.

declared to inure equally to the benefit of all creditors who, upon notice, should become parties to them. In 1846 and 1849, additional acts were passed on the subject. These were superseded by later provisions, embodied in the revised statutes, regulating the manner of making assignments by debtors, and the course of proceedings under them,[1] under which every assignment, in whatever form or however expressed, is declared to inure to the equal benefit of all creditors, and shall be construed to pass all the estate of the assignor not exempt from attachment.

A general insolvent law was passed in 1878.[2] and it has been held [3] that, so far as debtors who are insolvent are concerned, the general assignment act was repealed by the insolvent law, and that an assignee under a general assignment takes no title to the property of an insolvent person as against his creditors or assignee in insolvency.

§ 24. *Massachusetts.*—In Massachusetts the practice of making voluntary assignments appears to have grown out of the operation of the old system of *attachment*, under which the creditor was allowed to attach the personal property of his debtor, on mesne process, and hold it as security for such judgment as he might recover.[4] This right of attachment was founded upon early colonial laws, and its exercises became reduced to a system which has long been firmly established in that State.[5] It was partial and exclusive, however, in its operation, giving to any single creditor whose demand was sufficiently large, without regard to the origin of his debt, the privilege of seizing and appropriating to his sole use all the effects of the insolvent, leaving all other creditors entirely without remedy.[6] To remedy the evils of this system, the practice of voluntary assignments was resorted to,

[1] Rev. Stat. (ed 1871), p. 543.

[2] Laws of 1878, c. 74; Laws of 1879, c. 154; Laws of 1880, c. 199, and 1881, c. 15.

[3] Smith v. Sullivan, 71 Me. 150.

[4] Parker, C. J., in Lupton v. Cutter, 8 Pick. 298, 301; Shaw, C. J., in Russell v. Woodward, 10 Id. 407, 411.

[5] Id. ibid. [6] Parker, C. J., in Lupton v. Cutter, *ub. sup.*

with a professed view to make a fair distribution of all the effects and credits of the insolvent among all his creditors, in proportion to their several demands.[1] This practice, at first questioned, was, however, tolerated, and finally became sanctioned by a course of judicial decisions, which extended the right of assignment, as in other States, to the giving of preferences to one or more creditors over others.[2] Had it not been for this allowed feature of preference, the system of assignment might have entirely superseded that of attachment, and, in the language of Mr. Chief Justice Parker, there could have been no reasonable complaint if it had.[3] As it was, both systems were maintained, though in constant antagonism to each other; creditors striving by their attachments to gain preferences for themselves, and debtors constantly endeavoring, by assignments, to give such preferences to others. A very material check, however, was given to the exercise of the right of assignment, by the uniform course of judicial decisions, which made the *assent of creditors* a necessary requisite to the validity of an assignment as against subsequently attaching creditors.[4] This state of things continued—the attachment system on the whole maintaining its ascendency, though the evils and abuses of both were fully acknowledged[5]—until the year 1836; when a statute was passed[6] the object of which was to restrict the right of as-

[1] Parker, C. J., in Lupton v. Cutter, 8 Pick. 298, 301.

[2] Id. ibid.; Russell v. Woodward, 10 Pick. 407; Shaw, C. J., in Foster v. Saco Manufacturing Co. 12 Id. 451, 453; Dewey, J., in Nostrand v. Atwood, 19 Id. 281, 284.

[3] Lupton v. Cutter, 8 Pick. 298, 301, 302.

[4] See Widgery v. Haskell, 5 Mass. 144, 154; Stevens v. Bell, 6 Id. 339, 342; Ingraham v. Geyer, 13 Id. 146; Marston v. Coburn, 17 Id. 454; Russell v. Woodward, 10 Pick. 408; Morton, J., in Fall River Iron Works Co. v. Croade, 15 Id. 11, 15, 16; and in Everett v. Walcott, Id. 94, 97; Shaw, C. J., in Burlock v. Taylor, 16 Id. 335, 339. In the United States Circuit Court for Massachusetts, different views were held by Mr. Justice Story, and were ably illustrated and enforced in the leading case of Halsey v. Whitney; but the State courts continued to sustain what was regarded as the local policy of the State, down to the passage of the statute of 1836.

[5] Parker, C. J., in Lupton v. Cutter, 8 Pick. 298, 301; Wilde, J., in Pingree v. Comstock, 18 Id. 46, 51.

[6] "An act to regulate the assignment and distribution of the property of in-

signment on the one hand, by prohibiting preferences by debtors, and to limit the right of attachment on the other, by making assignments for the general benefit of creditors, executed in a certain form, valid as against all subsequent attachments and executions by individual creditors.[1] This statute dispensed with the necessity of the assent of creditors, as a prerequisite to the vesting of the property in the assignee, and the placing of it beyond liability to future attachments.[2] It did not, however, wholly proscribe the principle of preference, as it allowed to exist in full force the right to secure a lien or preference in favor of any creditor, by an attachment made before the execution of the assignment.[3] But in 1838 the principle of entire equality in distribution was more effectually carried out by the "act for the relief of insolvent debtors, and for the more equal distribution of their effects."[4] This statute in fact established a complete system of insolvency, with many of the features of a bankrupt law, and is considered to have abolished all voluntary payments, assignments, and preferences, made in contemplation of insolvency.[5] In Carter v. Sibley,[6] the Supreme Court of Massachusetts held that it repealed the statute of 1836, so far as the two statutes affected the same class of per-

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solvent debtors," passed April 15, 1836. Stat. of 1836, c. 238; Supplements to Rev. Stat. 1844 and 1854, p. 6.

[1] See observations of Shaw, C. J., in Perry v. Holden, 22 Pick. 269, 275; and of Dewey, J., in Henshaw v. Sumner, 23 Id. 446, 452.

[2] Dewey, J., in Shattuck v. Freeman, 1 Metc. 10, 13.

[3] Dewey, J., in Henshaw v. Sumner, 23 Pick. 452.

[4] Passed April 23, 1838. Stat. of 1838, c. 163; Supplements to Rev. Stat. 1844 and 1854, pp. 83, 99. There have since been passed on the same subject, the acts of March 18, 1841 (Stat. of 1841, c. 124; Supplements, p. 203), and of March 16, 1844 (Stat. of 1844, c. 178; Supplements, p. 316); and these three are now taken as constituting one system. Ex parte Jordan, 9 Met. 292, 294; see Wall v. Lakin, 13 Id. 167. More recently there have been passed on the same subject, the acts of March 30, 1846 (Stat. of 1846, c. 168; Supplements to Rev. Stat. 1854, p. 381); of May 20, 1851 (Stat. of 1851, c. 189; Supplements, p. 674); of May 24, 1851 (Stat. of 1851, c. 349; Supplements, p. 783); of May 7, 1852 (Stat. of 1852, c. 189; Supplements, p. 833); of April 1, 1853 (Stat. of 1853, c. 116; Supplements, p. 938); of April 15, 1854 (Stat. of 1854, c. 329; New Supplements, p. 53); and of May 17, 1855 (Stat. of 1855, c. 363; New Supplements, p. 202). See also the important acts of May 13, 1856, and of June 6, 1856, referred to *post*, p. 33.

[5] Kent's Com. [532] 690, note.

[6] 4 Metc. 298.

sons; but the court, in delivering their opinion, intimate that an assignment at common law, or in the form in use before the statute of 1836, if upon adequate consideration and legally assented to by creditors, might still be valid.[1] The same opinion was maintained by Mr. Justice Woodbury, in the case of Adams v. Blodgett,[2] in the Circuit Court. In the case of Edwards v. Mitchell,[3] it was expressly held by the Supreme Court of the State, that the assignment law of 1836 was repealed by the insolvent law of 1838, only so far as the provisions of the two statutes were inconsistent with each other. In the case of Zipcey v. Thompson,[4] it was held as against a New York assignment giving preferences, that the eleventh section of the statute of 1836, requiring assignments to be so made as to allow all the creditors to become parties to it, if they should see fit, was not repealed by the statute of 1838. In Edwards v. Mitchell it was further held that an assignment by a debtor of all his property to a trustee for the benefit of his creditors was inconsistent with the spirit and provisions of both statutes, and was voidable by any creditor who did not assent to it. In Wyles v. Beals,[5] the same doctrine was maintained in regard to an assignment by partners. But in Bigelow v. Baldwin,[6] an assignment of property by a debtor to a trustee for the benefit of creditors was held to be valid as between the parties executing it, notwithstanding both statutes. The chief justice, in delivering the opinion of the court in this case, said it had "repeatedly been decided that such assignments are voidable only, not void;" that the assignment could be avoided only by a creditor or other person not a party to it; and that, as no act had been done in the case having a tendency to avoid it,

[1] 4 Metc. 300, Shaw, C. J.

[2] 2 Woodb. & M. 233, 243.

[3] Decided, March Term, 1854. 1 Gray, 239; see also the opinion of Shaw, C. J., in Wyles v. Beals, Id. 2 3, 236.

[4] Decided at the same term. 1 Gray, 243.

[5] Decided at the same term. Id. 233. In this case clauses were introduced into the assignment for the express purpose of avoiding the effect of the insolvent laws, but they were held to be inoperative. See also Mann v. Huston, Id. 250.

[6] Decided at the same term. 1 Gray, 245.

the parties were bound by it. Since these decisions, the assignment law of 1836 had been expressly repealed by the adoption of the general statutes in 1860.[1] That statute having been repealed,[2] an assignment, even if voidable by an assignee in insolvency or bankruptcy, cannot be avoided by a creditor for his individual benefit without proof of that which would constitute fraud at the common law.[3]

§ 25. *Maryland.*—In Maryland it is expressly provided that no assignment shall be deemed fraudulent because of a condition requiring the creditors to release the debtor, and depriving any creditor who refuses to release, of all benefit from property so conveyed.[4] The assignee is required to file a bond before any title passes to him, and his failure to do so will empower the court, upon notice to creditors, to appoint another trustee.[5] It is the duty of the assignee also, within six months after giving the bond, to make a report of the whole amount of the trust estate, and of the disposition made of the same.[6]

§ 25*a*. *Michigan.*—In Michigan, all assignments for the benefit of creditors are void unless they are without preferences, and of all the assignor's property not exempt from execution, and unless the assignment or a duplicate is filed, and an inventory and bond given, as required by the act.[7] No attachment of the assignor's property made intermediate the

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[1] Stat. of 1856, c. 168; New Supplements to Rev. Stat. p. 309; Pub. Stat. (1882), c. 157; The Mechanics' & Traders' Bank v. Eagle Sugar Refinery, 109 Mass. 38; O'Neil v. Harrington, 129 Id. 591; Sullings v. Ginn, 131 Id. 479.

[2] Stat. of 1856, c. 284; New Supplements, p. 355. In Curtis' American Conveyancer (ed. 1847), p. 39, note, it seems to be assumed that there are no forms of assignment in use in Massachusetts, except those prescribed by the statute of 1838, where the assignment is the act of the court or commissioner charged with the jurisdiction of the case. See the statute, § 5; but see the cases of Wyles v. Beals, Edwards v. Mitchell, and Bigelow v. Baldwin, referred to *supra;* and see May v. Wannemacker, 111 Mass. 202.

[3] National Mechanics' & Traders' Bank v. Eagle Sugar Refinery, 109 Mass. 38; Cardenay v. New England Furniture Co. 107 Mass. 116; May v. Wannemacker, 111 Mass. 202.

[4] Maryland Code (1860), art. 48, § 13, p. 346; Rev. Code (1881), art. 67, § 13, p. 719.

[5] Laws of 1874, c. 483, §§ 107 *et seq.;* Rev. Code (1881), art 65, § 95.

[6] Id. § 96. [7] Laws of 1879, chap. 198; Laws of 1881, chap. 278.

execution of the assignment and the filing of the bond, is valid. The statute confers on the assignee the right to recover all property and equities in property which might be reached by any creditor of the assignor, and provides for the proof of debts and distribution of the property.

§ 25*b*. *Minnesota.*—An assignment for the benefit of creditors must in this State be in writing, subscribed by the debtor, acknowledged and filed, as required by the statute,[1] or the assignment will be void.[2] The debtor is required to file an inventory, and before the assignee can sell the assigned property, or convert it to the purposes of the trust, he must execute and file a bond.[3] The statute confers on the assignee power to recover property fraudulently conveyed by the assignor. The act of 1881,[4] makes stringent provision against preferences. The confession of a judgment, with intent, that one of the creditors should obtain a preference, is made a misdemeanor, punishable by fine or imprisonment. It provides for the voluntary execution of general assignments, which will defeat an attachment or levy made within ten days before the assignment, and for a receivership of the property of insolvent debtors, in case they shall fail to make such assignment within ten days after any levy by attachment or execution. Creditors who come in and share in the benefits of the assignment, must execute releases to the assignor. Conveyances and payments made in contemplation of insolvency, with the intent of giving a preference, within four months before the making of the assignment, are declared void as against the assignee. The act provides for the order of payment of debts and distribution among general creditors.

§ 26. *Mississippi—Missouri.*—In Mississippi there has been no special legislation as to general assignments. In

[1] Stat. of Minn., chap. 41, §§ 28–33; see Adler v. Ecker, 1 McCrary, 256.
[2] Williams v. Frost, 27 Minn. 255; Kingman v. Barton, 24 Id. 295.
[3] Kingman v. Barton, 24 Id. 295.
[4] Laws of 1881, chap. 148.

Missouri,[1] every voluntary assignment made by a debtor to any person, in trust for his creditors, must be for the benefit of all the creditors, in proportion to their respective claims. An inventory and bond are required to be filed, and very full provision is made for the accounting by the assignee, and for his discharge from the trust.

§ 26*a*. *Nebraska.*—In Nebraska,[2] all assignments in trust made by any debtor, on account of his inability to pay his debts, giving preferences (except for the payment of wages of labor), are declared by statute to inure to the benefit of creditors ratably. Conditions for a release are void, and the assignment is void if not properly recorded.[3] The assignee is required to file an inventory and to give a bond, and provision is made for proof of claims, and the settlement of the accounts of the assignee, and for the substitution and removal of the assignee.

§ 26*b*. *Nevada.*—In this State it is declared, in the "Act for the Relief of Insolvent Debtors and Protection of Creditors,[4] that no assignment of any insolvent debtor, otherwise than as provided therein, shall be legal or binding on creditors.

§ 26*c*. *North Carolina.*—In this State, assignments for creditors are regulated only by the rules of common law and the special statutes of the State respecting conveyances.

§ 27. *New Hampshire—New Jersey.*—In New Hampshire,[5] every assignment is required to provide for a proportional distribution of the assignor's estate, and passes all the debtor's estate to the assignee. The assent of creditors is presumed unless they make known their dissent. A copy

[1] 1 Rev. Stat., chap. 5. This statute does not avoid the assignment which gives the preference. The assignment will stand, but it will inure to the benefit of all the creditors, as well those not named as those named. Crow v. Beardsley, 68 Mo. 435. For a history of the Missouri statutes on assignments see Shultz v. Sutter, 3 Mo. App. 137.

[2] 1 Compiled Laws (1881), chap. 6.

[3] Heelan v. Hoagland, 10 Neb. 511.

[4] Laws of 1881, c. 97, sec. 39.

[5] General Laws of New Hampshire (ed. 1878), c. 140.

of the assignment and a schedule must be filed in the probate office, and the assignee must give a bond. In New Jersey,[1] assignments are, in like manner, required to be for the equal benefit of creditors, and all preferences are declared fraudulent and void.[2] The statutes in each of these States contain a variety of provisions regulating the manner of executing the trusts on the part of the assignees or trustees, and defining their duties and powers.

§ 28. *New York.*—Previous to the act of 1860,[3] there were no restrictions placed upon the general power to assign property for the benefit of creditors, except in the cases of corporations and limited partnerships, and these conveyances were governed by the statute of fraudulent conveyances, as applied and construed by the courts, and certain general provisions of the revised statutes relative to the creation of trusts. The act of 1860 was frequently amended,[4] and finally repealed and a new statute enacted.[5] The latter, with its amendments, requires that the assignment shall be in writing, shall be acknowledged and recorded, and the as-

[1] Revision of New Jersey Laws (1877), p. 86; Laws of 1879, c. 47; Laws of 1882, c. 146.

[2] But preferences not declared in the assignment, and not made in contemplation of it, are not prohibited by the act. Moses v. Thomas, 26 N. J. L. 124; Van Waggoner v. Moses, Id. 570; Garretson v. Brown, 26 Id. 425; see Livermore v. McNair, 34 N. J. Eq. 478. As to the power of the Orphan's Court, see See v. Zabriskie, 28 Id. 422.

[3] Laws of 1860, c. 348; Rev. Stat. (6th ed.) vol. III, pp. 32, 33; Fay's Dig. vol. I, p. 394.

[4] Laws of 1867, c. 860; Laws of 1870, c. 92; Laws of 1872, c. 838; Laws of 1873, c. 363; Laws of 1874, c. 600; Laws of 1875, c. 56.

The statute and its amendments no not make any alteration in the common-law rules of law governing assignments. "Its main object and purpose," says Mr. Justice Daniels, in People v. Chambers (1 Hun, 683), appears to have been to render general assignments by insolvent debtors more efficient and certain in the execution of the design for which the common law permitted them to be made, and to secure the full and faithful application of the debtor's property to the discharge of the creditors' demands according to the directions contained in the assignment."

It is not necessary that an assignment executed in compliance with the law of a foreign country, by non-residents, should conform to the requirements of the act, in order to sustain the title of the assignee to property which has come into his possession in this State. Ockerman v. Cross, 54 N. Y. 29.

[5] Laws of 1877, c. 466; amended by Laws of 1878, c. 318; 3 R. S. (7th ed.) p. 2276; see Matter of Croughwell, 9 Benedict, 360; Matter of Leahy, 8 Daly, 124; Pratt v. Stevens, 26 Hun, 229.

signee must give his written assent. The debtor is required to deliver to the county judge, within twenty days after the date of the assignment, a verified inventory or schedule of his assets and liabilities. His failure to do so, however, will not invalidate the assignment; but the assignee must within thirty days, or where more time is necessary, within sixty days, file an inventory of such property of the debtor as he may be able to find, and may compel the debtor and others to disclose under oath their knowledge of the matters necessary to the making of the inventory or schedule. Within thirty days after the date of the assignment, "and before he shall have power or authority to sell, dispose of, or convert to the purposes of the trust, any of the assigned property," the assignee is required to enter into a bond, in an amount to be directed by the county judge, to the people of the State, with sufficient sureties for the faithful performance of the trust and due accounting for the assigned property. After the lapse of one year, upon the petition of any creditor, or of an assignee's surety, or of an assignor, the assignee may be required to show cause before the county judge why a settlement of an account of proceedings of the assignee should not be had. The act also provides for the prosecution of the assignee's bond; for the filing of the inventory and bond; for the removal of the assignee,[1] and appointment of a new one, and prescribes fully the power of the court on accounting.

§ 29. *Ohio.*—In Ohio, by the act of February 23, 1835,[2] all assignments of property thereafter made by debtors to trustees, in contemplation of insolvency, and with the design of securing one class of creditors and defrauding others, were declared to inure to the benefit of all the creditors of

[1] The words "incompetency" and "misconduct" in the statute, embrace all the reasons for which an assignee ought to be removed. Matter of Cohn, 78 N. Y. 248.

For a full exposition of these statutes, see Bishop on Insolvent Debtors, Parts III and IV.

[2] 33 Ohio Stat. 13; Curwen, 161.

the assignor, in proportion to their demands.[1] This act was directed only against *fraudulent* conveyances to trustees, and did not affect conveyances made to a creditor, nor conveyances made to trustees without fraud.[2] The act of March 14, 1838,[3] went farther, and provided that all assignments of property in trust (whether fraudulent or not), which should be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, should be held to inure to the benefit of all the creditors, in proportion to their respective demands. It was further provided by this statute, that such trusts should be subject to the control of chancery, as in other cases; and the court, if need be, might require security of the trustees for the faithful execution of the trusts, or remove them and appoint others, as justice might require.[4] But conveyances by debtors, other than those made to trustees, were not affected by either of the above-mentioned statutes.[5]

A creditor still retained the right to receive from his debtor, in good faith, an assignment or conveyance of property to pay the debt or to secure it,[6] and it was still possible, when fraudulent conveyances were made not upon trust, for the judgment creditor whose superior diligence entitled him to that reward to secure the lien of his judgment by filing his bill in equity to set aside such conveyances, and thus a preferential distribution of the estate of an insolvent who had assigned the whole or a part of his estate in fraud of

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[1] Under this statute the conveyance was void, as to the preference created, although the fraudulent intent was confined exclusively to the assignor. Harshman v. Lowe, 9 Ohio, 92.

[2] Hulls v. Jeffrey, 8 Ohio, 390; Lane, J., Id. 391.

[3] Swan's Stat. (ed. 1841), pp. 717, 718, § 68; Curwen, 424.

[4] See also, to the same effect, the act of March 14, 1853; 51 Ohio Stat. 463; Swan's Stat. (ed. 1854), p. 468 (69), § 1; Curwen, 2239.

[5] Hulls v. Jeffrey, 8 Ohio, 390; Lane, J., Id. 391; see Mitchell v. Gazzam, 12 Ohio, 315.

[6] Brown v. Webb, 20 Ohio, 389; Fasset v. Traber, Id. 545; Doremus v. O'Harra, 1 Ohio St. 45; disapproving Mitchell v. Gazzam, 12 Ohio, 315; Atkinson v. Tomlinson, 1 Ohio St. 287; Bloom v. Nogle, 4 Id. 45; Harkrader v. Leiby, Id. 602.

his creditors, might be obtained. This inequality was removed by the act of 1853,[1] by which all fraudulent conveyances were made to inure to the equal benefit of all creditors, and created a trust to be administered by the court as in case of assignments to trustees for the benefit of creditors. By the act of February 12, 1863,[2] the common-law rights of creditors were so far restored as to give to the creditor instituting the proceedings to set aside the fraudulent conveyance, and to such other creditors as should become parties, a preference over other creditors; but before such preference can be obtained, the opportunity must be presented to all the creditors of becoming parties by giving them the required notice of the pendency and object of the suit.[3]

In 1859, an act entitled "An act regulating the mode of administering assignments in trust for the benefit of creditors,"[4] was enacted, which has been several times amended.[5] This act, with its several amendments, repealed and supplied the place of the act of 1853, and prescribes in detail the duties of the assignee, and confers upon creditors powers and privileges resembling those obtained under the bankrupt act in the selection of the assignee[6] and the examination of the debtor.[7] The present law on the subject is embodied in the Revised Statutes.[8]

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[1] 1 Rev. Stat. (S. & C.) p. 718.

[2] Stat. of Ohio (Sayler), vol. I, p. 354, c. 337; Shorten v. Woodrow, 34 Ohio St. 645; Hellebush v. Richter, 10 Am. L. Rec. 140. Under this act, any creditor whether his claim be reduced to judgment or not, may bring an action to set aside a fraudulent conveyance within four years. Combs v. Watson, 32 Ohio St. 228.

[3] Jameson v. McNally, 21 Ohio St. 295; and see Thomas v. Talmadge, 16 Id. 433. By act of April 16, 1874 (Sayler, vol. IV, p. 3250, § 2), the creditors are empowered to elect an assignee, and the proceedings for such election are provided in detail.

[4] Act of April 6, 1859 (Curwen, c. 2040).

[5] Amended by act of January 9, 1861 (Sayler, c. 1); act of April 18, 1861 (Sayler, c. 114); act of March 18, 1871 (Sayler, c. 1970); act of April 27, 1872 (Sayler, c. 2232); act of March 16, 1874 (Sayler, c. 2739); act of April 16, 1874 (Sayler, c. 2784).

[6] Act of April 16, 1874 (Sayler, c. 2739).

[7] Act of April 27, 1872 (Sayler, c. 2232).

[8] 2 R. S. (1879), §§ 6335–6358; amended by Laws of 1880, p. 189; see Brigel v. Starbuck, 34 Ohio St. 280. The provision of § 6352, which requires a

§ 29a. *Oregon.*—A general assignment law was passed in this State in 1878.[1] Under it no assignment is valid unless made for the benefit of all the creditors ratably. Its effect is to discharge all attachments[2] on which judgment shall not have been taken at the date of the assignment. The assent of creditors is presumed. The debtor must annex to the assignment an inventory under oath. Every assignment must be in writing, acknowledged and recorded. The assignee must also forthwith file an inventory under oath, and enter into bonds to the State. He must give notice, by publication, of the assignment, and at the expiration of three months thereafter must report and file a list, under oath, of all claiming to be creditors. No assignment will be declared fraudulent or void for want of any list or inventory, but the debtor may be examined under oath, and compelled to deliver the property to the assignee. If a claim is not presented within three months the creditor is postponed until after the payment in full of all claims presented and allowed within that time. The assignee has the same power as the debtor had to dispose of the estate, and can sue in his own name, but he must give notice of a sale of real estate. The court has power to appoint a new assignee, who has the same powers as though named in the assignment.

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creditor to present his claim to the assignee for allowance within six months after the publication of notice of his appointment, does not bar the right of a creditor to present his claim and have it allowed after that period has elapsed at any time before the settlement of the trust. Owens v. Ramsdell, 33 Ohio St. 439; see Dye v. Dye, 21 Id. 86; Haskins v. Alcott, 13 Id. 210; Lahm v. Johnston, 32 Id. 590. The power given to the assignee under § 6350, to sell and convey the real estate assigned, does not enable such assignee to extinguish by sale the wife's inchoate right of dower. Dwyer v. Garlough, 31 Ohio St. 158. The wife may, however, be made a party, and ask the court to have the real estate sold free of her contingent right of dower. Laws of 1880, p. 190. As to the jurisdiction of the courts and the right of appeal, see Dwyer v. Garlough, 31 Ohio St. 158; Aultman v. Seiberling, Id. 201. Under the statute the priority of judgment liens is to be determined according as the liens existed at the time the assignment took effect. Hence the failure of a judgment creditor to sue out and levy execution on the property after the assignment, does not affect the priority of the judgment lien. Under the statute, the administration of the trust created by the assignment takes the place of process of execution for the enforcement of the judgment. Scott v. Dunn, 26 Ohio St. 63.

[1] Laws of 1878, p. 36.

[2] Tichenor v. Coggins, 8 Oregon, 270.

§ 30. *Pennsylvania.*—In Pennsylvania, the earliest statute expressly affecting assignments for creditors, was the act of March 24, 1818,[1] which required them to be recorded in the county in which the debtor resided, within thirty days after execution. By the same act, assignees for the benefit of creditors were brought more directly within the jurisdiction of the courts; the act conferring on these tribunals the power of a chancellor, to compel the performance of such a trust, by calling for security, or dismissal of a defaulting or negligent assignee, and the substitution of another.[2] The system thus commenced was more fully developed and perfected by the act of June 14, 1836,[3] which provided additional safeguards for the interests of creditors, by requiring the making of inventories and the giving of bonds by assignees, and the appraisement of the property assigned, by sworn appraisers. The same statute contains a variety of provisions defining and regulating the powers of the courts of Common Pleas over assignees, and their accounts. A more important statute was that of April 17, 1843,[4] which took from debtors the power of making assignments with preferences, by declaring that such assignments should in future inure to the benefit of all the creditors ratably. The provisions of this act were afterwards extended by that of April 16, 1849,[5] and modified by the acts of April 2, 1849,[6] April 14, 1851,[7] April 22, 1854,[8] and May 4,

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[1] Purdon's Digest (Brightley, 10th ed.), p. 90.

[2] Bell, J., in Seal v. Duffy, 4 Barr, 274, 277.

[3] Laws of 1836, p. 630; Dunlop's Laws (ed. 1847), p. 688; Purdon's Digest (Brightley, 10th ed.), p. 90.

[4] Laws of 1843, p. 273; Dunlop's Laws, p. 896; Purdon's Digest (Brightley), p. 90.

[5] Laws of 1849, p. 664; Purdon's Digest (Brightley), p. 90.

[6] Laws of 1849, p. 337; Purdon's Digest (Brightley), p. 90.

[7] Laws of 1851, p. 542; Purdon's Digest (Brightley), p. 90; and see the act of May 6, 1850; Laws of 1850, p. 699; Purdon's Digest (Brightley), p. 90.

[8] Laws of 1854, p. 480; Purdon's Digest (Brightley), p. 90.

1864,[1] May 17, 1871,[2] February 17, 1876,[3] April 20, 1376,[4] June 10, 1881.[5]

§ 30a. *Rhode Island.*—By the statutes[6] of this State the Supreme Court has power on petition to require a bond and inventory from the assignee, and to remove him and appoint a new one. The assignee must within two months after accepting, render a verified inventory and schedule of the debtor's liabilities. The debtor may dissolve an attachment,[7] or levy, by making and recording an assignment within sixty days thereafter. No preferences are allowed to any creditor except the United States, Rhode Island, or a laborer who is entitled to wages for work performed within six months previous to the assignment. No general assignment by any limited partnership[8] is valid unless it provides for a *pro rata* distribution among all the creditors.

§ 31. *South Carolina.*—In South Carolina,[9] the creditors

[1] Laws of 1864, p. 762; Purdon's Digest (Brightly), p. 93.

[2] Laws of 1871, p. 269.

[3] Laws of 1876, p. 4. By the final confirmation of a sale made by an assignee under this act, the land is converted into money as of that date, and at the same time discharged from all such existing liens as are intended to be divested by the sale; the liens so divested are to be paid out of the proceeds of sale, according to their priority on the day of confirmation, with interest to that date. Burkholder's Appeal, 94 Penn. St. 522; Carver's Appeal, 89 Id. 276; Tomlinson's Appeal, 90 Id. 224; Herbst's Appeal, Id. 353.

[4] Ibid. p. 48; Estate of De Leon, 11 Phila. 286.

[5] Laws of 1881, p. 102.

[6] Public Laws of R. I. (ed. 1882), p. 657; see Petition of Ballou, 11 R. I. 359.

[7] But the assignment must be absolutely without preferences except such as are permitted by the statute. Noyes v. Johnson, R. I. Index N, 58; James v. Mechanics' Nat. Bank, 12 R. I. 460. This provision applies only to resident debtors. Pierce v. Crompton, R. I. Index O, 18. After the property had been attached by creditors, who claimed the assignment was invalid, the assignors made a new and unconditional assignment to the same trustees, in order to vacate the attachment under the above statute. *Held*, that the earlier assignment being good as against all persons but dissenting creditors, the later assignment could only affect property acquired after the earlier assignment, or thereafter becoming attachable or accruing to the assignors as surplus, and so did not dissolve the attachment. *Held*, further, that the assignment provided for in the above statute is both in fact and law to be construed as a voluntary assignment. Gardner v. Commercial Bank, R. I. Index N, 33; see also Petition of Bank of America, Id. 50; James v. Mechanics' Nat. Bank, 12 R. I. 460.

[8] Public Laws of R. I. (ed. 1882), p. 331.

[9] Rev. Stat. of South Carolina (ed. 1873), c. 97, p. 477; see McIntyre v. McClenaghan, 12 S. Ca. 185; Brooks v. Brooks, 12 Id. 422.

are empowered to name and appoint an agent or agents equal in number to the assignee or assignees, to act in their behalf jointly with the assignee or assignees named and appointed by the assignor. Provision is made for carrying out this authority, and unless the creditors fail to avail themselves of this privilege, sales and transfers made by the assignee prior to the appointment of the agent of the creditors are declared null and void. By an amendment of 1882,[1] three new sections were added to the revised statutes, to the effect that preferences, except in certain cases, render an assignment absolutely null and void; that certain transactions affecting the insolvent debtor's property, made within ninety days of the assignment, with the intent of giving a preference to a creditor who has reasonable cause to believe that the debtor is insolvent, and that the transaction is in fraud of the statute, are null and void against the assignee, and that any creditor may attach or enforce the assignment without first obtaining judgment.

§ 31*a*. *Tennessee.*—In this State,[2] when the assigned property exceeds five hundred dollars in value, the assignee is required to give bonds for the faithful performance of his trust. His failure to do so empowers any person interested to apply for a receiver. By a late statute[3] it is provided that preferences are illegal and void, but do not render the assignment itself invalid, which inures to the benefit of all creditors, *pro rata*, whether mentioned or not. Mortgages, deeds of trust, and other conveyances for the benefit of a particular creditor, made within three months preceding an assignment, and in contemplation thereof, are void after the making of the assignment. A similar provision exists as to the judgments by confession, default or collusion. The debtor must annex to the assignment an inventory or schedule,

[1] Laws of 1882, p. 847.

[2] Stat. of Tennessee (ed. 1871), vol. I, p. 921; see Thompson *v.* Childress, 1 Tenn. Ch. 369.

[3] Laws of 1882, p. 154.

under oath. Mortgages and deeds of trust may, however, be made to secure payment for property bought, or money loaned, provided they are made at the time of purchase or borrowing.

§ 31*b*. *Texas.*—In 1879[1] an act was passed providing that every assignment for the benefit of creditors should be construed to pass all the debtor's property, whether specified therein or not. It must be proved or acknowledged, and certified and recorded, like a conveyance. The debtor must annex an inventory. He may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate, and discharge him from their respective claims. The assignee must give public notice of his appointment, and consenting creditors must make known to the assignee their consent in writing. The assignee must give a bond. Non-consenting creditors may garnishee the assignee for any excess remaining in his hands after the payment of consenting creditors. The statute also contains various provisions in regard to conveyances intended to give a preference, to the allowing of claims, and the removal and discharge of the assignee.

§ 32. *Vermont.*—By the statute of November 1, 1843,[2] all general assignments thereafter made by debtors for the benefit of creditors were declared to be, as against such creditors, null and void. This statute was repealed[3] by act of November 19, 1852,[4] which declares that all[5] assignments

[1] Act of 1879, c. 53, p. 57; R. S. (ed. 1879), appendix, p. 5.

[2] Act of 1843, p. 7; Compiled Stat. (ed. 1851), p. 390, § 6. For the reasons which led to the enactment of this statute, see the opinion of Isham, J., in Peck v. Merrill, 26 Vt. 686, 692.

[3] Farr v. Brackett, 30 Vt. 344.

[4] Laws of 1852, p. 14. See the history of the legislation on this subject discussed in Passumpsic Bank v. Strong, 42 Vt. 29; see Vail v. Pecks, 27 Vt. 764. The provisions of this act do not apply to assignments made out of the State by non-residents. Hanford v. Paine, 32 Vt. 442.

[5] The act of 1843 was confined to general assignments. Partial assignments were still permitted. Mussey v. Noyes, 26 Vt. 462; Noyes v. Hickok, 27 Id. 36. But the act of 1852 applies also to assignments of a part of a debtor's property for the benefit of a part of his creditors. Passumpsic Bank v. Strong, 42 Vt. 29; overruling, on this point, Stanley v. Robbins, 36 Vt. 422.

for the benefit of creditors shall be in writing and signed by the debtor; and in case real estate is assigned, it shall be by deed executed and recorded conformably to the laws relating to the conveyance of real estate. By a subsequent act,[1] all assignments were required to be for the equal benefit of all the creditors of the assignor, in proportion to their respective claims. These acts, as amended[2] and now incorporated into the general statutes,[3] contain a variety of provisions requiring the assignment to contain a specific description of the property, and to be accompanied by an inventory of the assigned property and a list of creditors, regulating the proceedings under the assignment, and giving to creditors the power of enforcing a settlement of the trust in a court of chancery.

The assignors are also confined in the selection of assignees to persons not creditors and not interested in the assignment.

§ 33. *Virginia—West Virginia.*—In these States there has been no special legislation on the subject of voluntary assignments by debtors, and these conveyances are governed by the statute of fraudulent conveyances as applied and construed by the courts, and certain general provisions of the statutes relative to trusts.

§ 33*a*. *Wisconsin.*—In this State,[4] voluntary assignments are declared void unless made to a resident assignee, who shall give a bond[5] for the faithful performance of the trust, in amount equal to the value[6] of the property, to be ascer-

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[1] Laws of 1855, p. 15.

[2] See Act of Nov. 10, 1857; Laws of 1857, p. 13.

[3] Gen. Stat. (2d ed. 1870), tit. 21, c. 67, p. 453; see Claflin v. Kimball, 52 Vt. 6.

[4] Stat. of Wisconsin (ed. 1871), c. 63, vol. I, p. 843; R. S. § 1697; see Steinlein v. Halstead, 52 Wis. 289; Farwell v. Gundry, Id. 355.

[5] Churchill v. Whipple, 41 Wis. 611; Smith v. McCulloch, 42 Id. 564; Hutchinson v. Brown, 33 Id. 465; Klauber v. Charlton, 47 Id. 564; Same v. Same, 45 Id. 600.

[6] Ball v. Bowe, 49 Wis. 495.

tained by the oath of one or more witnesses and of the assignor; the bond to be given to the clerk of the Circuit Court for the benefit of the creditors. The assignee is also required to accept the assignment in writing indorsed on the assignment and attested by the clerk.[1]

[1] Scott v. Seaver, 52 Wis. 175.

CHAPTER III.

VOLUNTARY ASSIGNMENTS CONSIDERED IN CONNECTION WITH THE BANKRUPT LAW.

§ 34. The bankruptcy system introduced by statute into the jurisprudence of England, and derived from the civil law,[1] proceeds upon principles and methods in many respects dissimilar to those of the common law. While the common law rewards the diligence of creditors by distributing the estate of an insolvent debtor amongst them according to the priorities they obtain in the pursuit of it, the bankruptcy system regards the property of the debtor as of right belonging to the whole body of his creditors, to be distributed ratably among them towards the satisfaction of their claims.[2]

The common law, in the enforcement of its judgments, seizes only so much of the debtor's property as is sufficient to pay in full the individual claim of each creditor as it ripens into execution, but the bankruptcy law on the occasion of certain acts, termed acts of bankruptcy, at once sequestrates the entire estate of the debtor, and places it beyond his control and under a course of distribution in the hands of its own officers. At common law, the debtor must satisfy the claims of his creditors to obtain their voluntary releases, if he would be rid of the burden of his liabilities. The humane policy of the bankrupt law discharges the honest debtor from all his obligations, upon compliance with the conditions prescribed by the law for his discharge.

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[1] The early law of Rome gave creditors the savage remedy of dividing the body of their debtor or selling him and his family into slavery. The *Lex Paetelia* (about 326 B. C.) enabled a debtor who could swear to being worth as much as he owed, to save his freedom by resigning his property. And many years later the legislation of Julius Cæsar established the *cessio bonorum*, as an available remedy for all honest insolvents. See Institutes Justinian, 4, 6, 40; Sanders' Justinian (Hammond), 541.

[2] Robson's Law of Bankruptcy (2d ed.), p. 1.

Voluntary assignments for the benefit of creditors, manifestly interfere with the operation of each of these systems. Apart from statutory regulations they may be said to be the creatures of courts of equity.[1] But although they withdrew the property of the debtor from the legal pursuit of creditors, they are not, when honestly made, regarded as in contravention of the common law.[2]

Inasmuch, however, as the method they provide for the payment of the debts of an insolvent is that ordained by the debtor himself, and that method may be at variance with the provisions of the bankruptcy system, they are, whenever brought within the jurisdiction of that system, "subjected to the sharpest scrutiny,"[3] and they have not unfrequently been regarded, even when made for the equal benefit of all creditors, as wholly repugnant to the spirit and provisions of the bankrupt act. A brief review of the bankruptcy legislation as affecting voluntary assignments is essential to a clear apprehension of the questions which have arisen under the administration of the bankrupt law.

§ 35. *English Statutes.* — The first introduction of a bankrupt law in England was by the statutes of 34 and 35 Hen. VIII, c. 4.[4] This statute was very imperfect. It empowered the lord chancellor and other high officers, upon petition of a creditor, to seize and distribute the estate of bankrupts ratably among their creditors. But the grounds of the application were confined within no definite limits.[5] This statute was enlarged[6] and almost totally altered by 13 Eliz. c. 7. By the statute of Elizabeth, the law of

[1] Carlton v. Baldwin, 22 Tex. 724.

[2] See *ante*, p. 23. Lord Ellenborough, in Pickstock v. Lyster, 3 M. & S. 372.

[3] Mr. Justice Swayne, in Farren v. Crawford, 2 N. B. R. 602.

[4] 2 Bl. Com. 474.

[5] This statute was, as we learn from the preamble, directed against debtors "who, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay, or return to pay, any of their creditors their debts and duties, but at their own will and pleasure consume the substance obtained by credit from other men for their own pleasure and delicate living, against all reason, equity and good conscience."

[6] Sir J. Jekyll, in Small v. Oudley, 3 P. Wms. 427.

bankruptcy was restricted to traders, and certain acts of bankruptcy were prescribed, upon the commission of which a trader became liable to be adjudged bankrupt. But it does not appear that a voluntary assignment for creditors, or that even fraudulent conveyances, such as those included within the statute of fraudulent conveyances[1] enacted in the same year, were regarded as acts of bankruptcy. The statute of 1 Jac. I, c. 15, sec. 2, made it an act of bankruptcy for a debtor to "make, or cause to be made, any fraudulent grant or conveyance of his, her or their lands, tenements, goods or chattels, to the intent or whereby his, her or their creditors, being subjects born as aforesaid, shall, or may be, defeated or delayed for the recovery of their just and true debts."[2]

Numerous statutes[3] relating to bankruptcy were thereafter, from time to time, enacted, the most important of which were 21 Jac. I, c. 19, and 5 Geo. II, c. 30. By the latter statute the creditors were empowered for the first time to make choice of an assignee.

§ 36. All these statutes were repealed by that of 6 Geo. IV, c. 16, which consolidated the different regulations on this subject into one act. In this act the language in reference to fraudulent conveyances was changed, and it was made an act of bankruptcy for a debtor to make, or cause to be made, any fraudulent gift, delivery or transfer of any of his goods or chattels with intent to defeat or delay his creditors in the recovery of their debts.[4] This language remained substantially unaltered in the English bankrupt acts down to 1869, when the words "with intent to defeat and delay," &c., were omitted.

By the act of Geo. IV, an important exception was made in favor of conveyances of all a debtor's property to a trustee for the benefit of all his creditors. By the fourth section

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[1] 13 Eliz. c. 5.

[2] Mr. Justice Cadwalader, in Barnes v. Rettew, 8 Phila. 135.

[3] Bl. Com. 474. No provision was made for the discharge of the bankrupt from his debts until 4 Anne, c. 17, § 10; Ibid. c. 15.

[4] Mr. Justice Cadwalader, in Barnes v. Rettew, 8 Phila. 135.

of this act, such a conveyance executed in the manner prescribed, by the trustee, duly attested and given publicity by published notice, was declared not to be an act of bankruptcy unless a commission issued within six months thereafter.[1] This act was followed by numerous others,[2] to which no particular allusion is here required.

In the year 1849, a most important statute, known as "the bankrupt law consolidation act, 1849,"[3] was passed for the amendment and consolidation of the bankruptcy laws.

By the 68th section of that act it was provided that if any trader amenable to the act should execute any conveyance or assignment by deed of all his estate and effects to a trustee or trustees, for the benefit of all his creditors, the execution of such deed should not be deemed an act of bankruptcy, unless a petition for an adjudication of bankruptcy should be filed within three months from the execution thereof, provided the deed were executed by the assignee, attested, and notice thereof given as prescribed.[4]

It was further provided by the 224th section of the act, and the sections immediately following, that deeds of arrangement entered into between a debtor and his creditors, and executed by six-sevenths in number and value of the creditors whose debts amounted to £10 and upwards, should be binding upon all creditors, and provision was made for completing such arrangements.

The construction put upon these provisions, by the case of Tetley v. Taylor,[5] defeated to a large extent the benefits which were expected to result from deeds of arrangement, by requiring in every case a complete surrender of the entire estate of the debtor, thus destroying one important element in

[1] Botcherly v. Lancaster, 3 N. & M. 384; Lord Abinger, in Siebert v. Spooner, 1 M. & W. 714.

[2] 1 & 2 Wm. IV, c. 56; 2 & 3 Wm. IV, c. 114; 5 & 6 Wm. IV, c. 29; 7 & 8 Vict. c. 70; 7 & 8 Vict. c. 96; 10 & 11 Vict. c. 102.

[3] 12 & 13 Vict. c. 106.

[4] 12 & 13 Vict. c. 106, s. 68; Chitty's Stat. vol. I, p. 277.

[5] 1 El. & Bl. 521; s. c. 21 L. J. Rep. (N. S.) Q. B. 346.

such arrangements, namely, the continuance of the debtor's business.[1]

By the bankrupt act of 1861,[2] the bankruptcy system was extended to non-traders as well as traders, and still more liberal provision was made for carrying out amicable arrangements and settlements between debtors and their creditors.

Under the 192d section of that act, deeds of trust entered into between a debtor and his creditors, or any of them, or a trustee on their behalf, were declared valid, effectual and binding on all the creditors of such debtor, as if they were parties to it, providing a majority in number, representing three-fourths in value of the creditors of such debtors whose debts, respectively, amounted to £10 and upwards, should assent to or approve of such deed, and provided such deed should be accepted by the assignee, be attested, registered, stamped, and notice thereof given in compliance with the requirements of the act.

§ 37. No material changes were thereafter made in the English bankruptcy laws as affecting voluntary assignments for the benefit of creditors previous to the date of the passage by Congress of the bankrupt act of March 2d, 1867. Very important alterations, however, have been effected in the English system by the bankruptcy act of 1869.[3] By the sixth section of that act it is expressly declared to be an act of bankruptcy, "that the debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally; and by the 92d section preferences fraudulent in bankruptcy may be avoided by the assignee. Inasmuch as the existing bankrupt law in this country was modeled largely upon the English statutes of

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[1] See Lord Chan. Westbury, in Ex parte Morgan in re Woodhouse, 32 L. J. Rep. Bank. 15.

[2] 24 & 25 Vict. c. 134.

[3] 32 & 33 Vict. c. 71. This act is said to have been modeled upon the Scotch system as contained in the 19 & 20 Vict. c. 79. See Robson's Law of Bank. (2d ed.) p. 10.

1849 and 1861, in connection with the insolvent law of Massachusetts,[1] an examination of the construction placed upon the English statutes as affecting voluntary assignments for creditors will not be out of place.

§ 38. *The English Doctrine.*—It should, in the first place, be observed, that at no time previous to the act of 1869,[2] has any English statute expressly declared the giving of a preference, or the assignment of the whole or any part of a debtor's estate, either directly to creditors or in trust for them, to be an act of bankruptcy, or avoidable by an assignee in bankruptcy.

The rules of law relating to these subjects have arisen entirely from judicial construction[3] of the language of the statute of fraudulent conveyances introduced into 1 Jac. I, c. 15,[4] and retained in a somewhat modified form in 6 Geo. IV, c. 16,[5] interpreted in the light of the policy and object of the bankruptcy system. The words made use of are, in substance, the same as those employed in the statute of fraudulent conveyances, 13 Eliz. c. 5, and, as construed in the bankruptcy acts, have always been understood as comprehending conveyances void at common law or under the statute of 13 Eliz. c. 5.[6] Their interpretation in the bankrupt law has, however, been greatly extended by the courts.

§ 39. *Assignments with preferences.*—As early as the year 1758, Lord Mansfield, in the case of Worseley v. De Mattos,[7] very clearly and emphatically announced the doctrine which has ever since been regarded as settled law, that a conveyance by an insolvent debtor of his entire estate

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[1] Mr. Justice Cadwalader, in Barnes v. Rettew, 8 Phila. 135.

[2] 32 & 33 Vict. 71, ss. 6, 92.

[3] The doctrine of fraudulent preference, described by Lord Ellenborough as an excrescence on the bankrupt act (2 Camp. 168), is entirely of judicial creation, and is generally considered to have been introduced by Lord Mansfield. Alderson v. Temple, 4 Burr. 2235; s. c. 1 W. Bl. 660; Harman v. Fisher, Cowp. 117; Rust v. Cooper, Cowp. 629; Martin v. Pewtress, 4 Burr. 2477; Robson's Law of Bank. (2d ed.) 125.

[4] See *ante*, § 35.

[5] See *ante*, § 36.

[6] Eden on Bankruptcy, p. 17.

[7] 1 Burr. 567.

to a particular creditor is an act of bankruptcy. He said: "An equal distribution among creditors who equally give a general personal credit to the bankrupt is anxiously provided for ever since the act of 21 Jac. I, c. 19."

The same opinion was expressed by him in the cases of Wilson v. Day,[1] Compton v. Moore,[2] and Hooper v. Smith.[3] Some years later Lord Ellenborough, in the case of Newton v. Chandler,[4] said: "As a general proposition, it cannot be disputed that a conveyance by deed by a trader, of all his property to a particular creditor, in prejudice to the rest, is an act of bankruptcy."[5]

And the same conclusion is reached where the conveyance is of all a debtor's property, except some specified.[6] These decisions appear to have been placed upon two distinct grounds: first, the manifest effect of such conveyances in defeating the great object of the bankrupt law, to wit, an equal distribution of the estate of a debtor; and second, the fact that such conveyances, by divesting a trader of his entire property, render it impossible for him to carry on his trade.

It has sometimes been said that the reason why a conveyance of a debtor's entire estate is an act of bankruptcy, is because it amounts to a declaration of insolvency,[7] or, as Lord Mansfield is reported to have said, because it is "an assignment of his solvency."[8] But, clearly, a man may be insolvent without being a bankrupt, and an act which simply amounts to a declaration of insolvency, or which renders a debtor insolvent, is not necessarily an act of bankruptcy.

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[1] 1 Burr. 827. [2] 1 Wm. Bl. 361. [3] 1 Wm. Bl. 441.

[4] 7 East, 143 (1806); and see Lord Abinger, in Siebert v. Spooner, 1 M. & W. 714; The Oriental Banking Co. v. Coleman, 3 Gif. 11.

[5] See also Linden v. Sharpe, 6 M. & G. 875; Siebert v. Spooner, 1 M. & W. 714; Whitwell v. Thompson, 1 Esp. 72; Hutton v. Crutwell, 1 El. & Bl. 15; Lomax v. Buxton, L. R. 6 C. P. 107.

[6] Pulling v. Tucker, 4 B. & A. 382; Gaynor's Case, cited in Worseley v. De Mattos, 1 Burr. 479; and also in Butcher v. Easto, 1 Doug. 294; and see 2 Cowp. 633.

[7] Worseley v. De Mattos, 1 Burr. 827; Haswell v. Simpson, 1 Doug. 91.

[8] Hooper v. Smith, 1 W. Bl. 441; Compton v. Bedford, Id. 362.

And Lord Mansfield, subsequently admitting this to be the rule of law, observed that the remark above quoted was incorrectly reported, and "that the reason why a man becomes a bankrupt, who conveys away all of his property, is that he thereby becomes totally incapable of trading."[1] We shall have occasion to refer to this topic again.

§ 40. But where there is a substantial exception out of the debtor's property, such an exception as ought possibly to enable him to carry on his trade with advantage, a conveyance of his property is not necessarily and by force of law, without reference to extrinsic circumstances showing fraud, an act of bankruptcy.[2] And where the conveyance is of the whole property, not merely for an antecedent debt, but also for a present advance of which the debtor really has the advantage, and which he can apply to the purchase of stock or otherwise for his use, it is not necessarily and *per se* an act of bankruptcy.[3] It should be further remarked, under the law, as it existed previous to 1869, two things were held necessary to constitute a fraudulent preference, first, the transaction was required to be the voluntary and spontaneous act of the debtor from which the desire to prefer was inferred;[4] and secondly, it was required to be done in contemplation of bankruptcy.[5] It is, therefore, clear that a

[1] See Reporter's Note to Law v. Skinner, 2 W. Bl. 996.

[2] Lomax v. Buxton, L. R. 6 C. P. 107; see Robson's Law of Bankr. (2d ed.) p. 124, and cases cited.

[3] Whitwell v. Thompson, 1 Esp. 72; Hutton v. Crutwell, 1 El. & Bl. 15; Brittlestone v. Cook, 6 Id. 296; s. c. 2 Jur. N. S. 758; Harris v. Rickett, 4 H. & W. 1; s. c. 28 L. J. Exch. 197; see also Frazer v. Thompson, 5 Jur. N. S. 669; also, s. c. on appeal, 4 De G. & J. 659.

[4] Brown v. Kempton, 19 L. J. C. P. 169; Edwards v. Glyn, 2 El. & Bl. 20; s. c. 5 Jur. N. S. 1397; see also Smith v. Timms, 1 H. & C. 849; s. c. 9 Jur. N. S. 1285; 32 L. J. Exch. 215; Morgan v. Brundrett, 5 B. & Ad. 296; Pennell v. Heading, 2 F. & F. 744; Graham v. Candy, 3 Id. 206; Kennear v. Johnson, 2 F. & F. 753; Davidson v. Robinson, 3 Jur. N. S. 791; Bills v. Smith, 34 L. J. Q. B. 68; Robson's Law of Bankr. (2d ed.) p. 127.

[5] Morgan v. Brundrett, 5 B. & Ad. 296; Atkinson v. Brindall, 2 Bing. N. C. 225; Abbot v. Burbage, 2 Scott, 656; Strachan v. Barton, 11 Exch. 647; Gibson v. Boutts, 4 M. & G. 169; s. c. 3 Scott, 229; Gibson v. Muskett, 4 M. & G. 160; s. c. 3 Scott N. R. 427; Poland v. Glyn, 4 Bing. 22, n.; Ex parte Simpson, De G. 9; Aldred v. Constable, 4 Q. B. 674; s. c. 7 Jur. 509; Robson's Law of Bankruptcy (2d ed.) p. 128.

general voluntary assignment by an insolvent debtor, permitting preferences, is, and always has been, regarded as an act of bankruptcy, unless it be assented to by all the creditors.

§ 41. *Assignments for Equal Benefit of Creditors.*— Where, however, no preference is given, and the assignment is honestly made for the equal benefit of all the creditors, a more difficult question arises. The English cases have gone to the full extent of declaring such conveyances fraudulent in bankruptcy. "This doctrine," says Lord Henley, "has occasionally met with disapprobation, and the reasons upon which it is founded are by no means satisfactory."[1]

The first case in which the point was judicially determined, was Kettle v. Hammond,[2] before Lord Mansfield at *nisi prius*, which was an assignment by a trader, to two of his creditors in trust for all the rest. A few years later, in the case of Eckhardt v. Wilson,[3] the general doctrine was considered so clear that it was not argued, and in the early case of Tappenden v. Burgess,[4] Mr. Justice Grose, in delivering the opinion of the court, said, "here the bankrupts have done an act to divest them of all their property, which by all the cases is an act of bankruptcy." And the court relied upon the authority of Bamford v. Baron.[5] A little later Lord Eldon, in Ex parte Bourne,[6] went somewhat more into the question. He said, "I recollect cases in which it was settled upon a singular ground, that an assignment of all the property is an act of bankruptcy, though the direct and immediate object is not to delay, but to satisfy the creditors; but it was held that a trader had not a right by deed to place his property under a distribution different from that ordained by the bankrupt law, and it was carried to this extravagant length, that though the assignment was intend-

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[1] Eden on Bankruptcy, p. 28.
[2] Cooke Bank. Law, 100; Eden on Bankruptcy, 29.
[3] 8 Term R. 140.
[4] 2 Term R. 594.
[5] 4 East, 220 (1803).
[6] 16 Ves. 148 (1809).

ed for the benefit of all the creditors, including that one, yet it was an act of bankruptcy." In a previous case, Ex parte Richardson,[1] Lord Eldon, without passing upon the question, directly assumed the assignment to be an act of bankruptcy, and in later cases[2] he adhered to the authority by which he had declared himself bound in Ex parte Bourne. The rule thus established has been frequently applied[3] by the British courts, and although attempts have been made on the part of the legislature to relax it,[4] none have fully succeeded,[5] and it has now become an integral part of the English bankrupt law.[6] The reasons adduced in support of this doctrine are substantially as follows:

First, that announced by Lord Eldon, that a debtor has no right to place his property under a distribution different from that ordained by the bankrupt law. This objection lies not against the ultimate distribution effected by the assignment, but against the means employed in effecting it, assuming that the creditors have a legal right in cases of insolvency, to the privileges and methods provided by the bankrupt act, and to the assistance and protection of the bankrupt court in the distribution of the insolvent's estate.

The second is that advanced by Lord Mansfield, that by such a disposition of his property a trader deprives himself of the power of carrying on his trade.

§ 42. This doctrine, as we have seen, arose from judicial construction of the language of the statute 1 Jac. I, c. 17.[7]

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[1] 14 Ves. 184 (1807).

[2] Ex parte Smith, 1 Ves. & B. 518 (1813); Dutton v. Morrison, 17 Ves. 199; Ex parte Cawkwell, 19 Ves. 284.

[3] Linden v. Sharpe, 6 M. & G. 895; Stewart v. Moody, 1 C., M. & R. 777; Ex parte Wensley, 1 De G., J. & S. 273; Turner v. Hardcastle, 11 C. B. 704; Botcherly v. Lancaster, 3 N. & M. 383; Smith v. Timms, 7 Jur. N. S. 1015; Sperritt v. Willows, 13 W. R. 329; Ex parte Zwelchenbart, 3 M., D. & D. 671; Porter v. Walker, 1 M. & G. 686; Smith v. Cannan, 2 El. & Bl. 85.

[4] See Lord Henley, Eden on Bankruptcy, p. 31.

[5] Lord Chan. Westbury, in Ex parte Morgan in re Woodhouse, 32 L. J. Bank. 15.

[6] Bankrupt Act, 1869, 32 & 33 Vic. 71, § 6.

[7] Mr. Justice Montague Smith, in Lomax v. Buxton, L. R. 6 C. P. 115.

When the words of that statute were altered by 6 Geo. IV, c. 16, from these, "with intent, or whereby his creditors may be defeated, &c.," to these, "with intent to defeat or delay his creditors, &c.," making the phraseology of the statute conform more nearly to that of 13 Eliz. c. 5, it was contended, in the case of Stewart v. Moody,[1] that though the former act might warrant the construction put upon it in cases where creditors were in fact delayed, though such was not the intention of the parties, yet in the latter act it was open to contend that the intent to defeat or delay the creditors was requisite and material to constitute an act of bankruptcy. To this Baron Parke replied, that the latter statute was the same in effect as the former, only more concise, and that the latter act was not intended to alter the former law; and he adds, "it has been clearly settled that if the necessary consequence of a man's acts is to delay his creditors, he must be taken to intend it;" but this answer hardly meets the force of the contention.

It had been well settled under 13 Eliz. c. 5, that a general assignment for the equal benefit of all creditors, honestly made, does not delay or defraud creditors within the meaning of that statute,[2] and as a consequence no fraudulent intent on the part of the debtor could be presumed from the execution of such a conveyance. When the language of the bankrupt act, therefore, was made to conform to that of 13 Eliz. c. 5, why should a fraudulent intent be assumed under the language of the bankrupt act, when no such intent could be assumed under similar language in the statute of Elizabeth? No satisfactory answer to this question was then given, nor has any since been suggested.[3]

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[1] 1 C., M. & R. 777.

[2] Pickstock v. Lyster, 3 M. & S. 375; and see *ante*, p. 23.

[3] Lord Justice Mellish, in Ex parte Luckes in re Wood, 36 L. T. Chan. 117, in commenting upon the express reference to voluntary assignments contained in the 6th section of the act of 1869, observes: "Now I agree that the reason why that particular act of bankruptcy has been separated from the act of bankruptcy respecting fraudulent conveyances and transfers, in which it is included in all former acts, is this, that, although it was an undoubted rule of law that such a transfer or conveyance was to be deemed to be fraudulent, *yet it was really absurd*

§ 43. *Exemption of Assignments from Operation of Act.* —The provisions of the acts of 1849 and 1861, protecting general assignments for the benefit of creditors from the operation of those acts, upon compliance with the statutory regulations, have not been considered as altering the law making such assignments fraudulent within the policy of the bankruptcy system, except upon strict compliance with the terms imposed.[1]

When the bankruptcy system was extended to non-traders as well as traders, the argument that an assignment by a trader of all his estate was an act of bankruptcy because it prevented him from carrying on his trade, was applicable to a part only of those persons amenable to the act, for it might well be that an insolvent non-trader might be able to carry on his avocation, although he had executed such an assignment.[2]

The special provisions of these acts referred to were undoubtedly intended to relax the severity of the rule in reference to the execution of assignments by creditors ratably.

Lord Westbury, in commenting upon these provisions, remarked, "it was the object of the legislature in passing the 192d section of the bankruptcy act of 1861, and the seven or eight subsequent sections, to establish and give security to a private administration of an insolvent estate against process at common law, and also against proceedings in bankruptcy."[3]

§ 44. *General Grounds of English Rule.*—At the time of the passage by Congress of the bankrupt act of March 2,

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to call it fraudulent. It had no taint of fraud at all about it in the great majority of cases, and therefore it was for the sake of making the language of the act rational, and not for the sake of altering the law—for it left the law exactly as it was—that the act of bankruptcy comprised in the first subsection of the 6th section has been separated from the other acts of bankruptcy with which it was formerly joined, namely, from the fraudulent conveyances and transfers, and therefore the words 'with intent to defeat or delay his creditors' have been left out."

[1] Ex parte Alsop in re Rees, 1 De G., J. & J. 289; Ex parte Morgan in re Woodhouse, 32 L. J. Bank. 15; Ex parte Rawlings, Ib. 27; Ex parte Godden in re Shettle, Ib. 37; Ex parte Spyer, Ib. 63; Dell v. King, 38 L. J. Exch. 47.

[2] See Ex parte Luckes, 26 L. T. N. S. 118; In re Wood, 7 L. J. Chan. 302.

[3] Ex parte Morgan in re Woodhouse, *supra.*

1867, the making of a general assignment, although for the equal benefit of all creditors, was, as we have seen, subject to the restrictions above stated, regarded by the English courts as an act of bankruptcy, and such a conveyance was therefore void in bankruptcy, unless assented to by all the creditors. The grounds of this doctrine, uncertain at first, had not been strengthened by the lapse of time. The rule so established rested upon an extended construction of the words of the statute 13 Eliz. c. 5, incorporated into the bankrupt act, and that construction was not in harmony with the interpretation already placed upon these words.[1]

Lord Eldon's declaration that a debtor had no right to place his property under a course of distribution different from that ordained by the bankrupt law, proceeded upon the theory that creditors had the right to the management of the estate of an insolvent previous to the commission of an act of bankruptcy, and that an interference with this right was itself an act of bankruptcy. And this was so held, while it was fully admitted that the mere fact of insolvency conferred no legal rights upon creditors before the debtor had come under the operation of the bankrupt law. The notion that a trader may not terminate his trade by a general assignment, rather than to wait for creditors to secure their preferences by law, or to break him up by an adjudication in bankruptcy, is based ultimately upon the same theory that the debtor's right to manage his property ceases with his solvency. The unsatisfactory grounds upon which the general doctrine rests, together with the alterations effected by the acts of 1849 and 1861, and the intent of those alterations, as defined by Lord Westbury, may well create a very serious doubt as to whether Congress, in enacting the present bankrupt law, intended to adopt the English rule in reference to general assignments for the equal benefit of all creditors, as established under the general bankruptcy system.

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[1] See *ante*, § 42 and note; see Globe Ins. Co. v. Cleveland Ins. Co. 14 N. B. R. 322; and see p. 324.

§ 45. *United States Bankrupt Acts of* 1800 *and* 1841.—Under the constitutional power conferred upon Congress "to establish uniform laws upon the subject of bankruptcies throughout the United States," three bankrupt laws have been enacted—one under the act of Congress of April 4, 1800,[1] which was repealed by the act of December 19, 1803;[2] one under the act of August 19, 1841,[3] which was repealed by the act of March 3, 1843;[4] and one under the act of March 2, 1867,[5] which was repealed in 1878.[6]

The two statutes first referred to were modeled, to a large degree, upon the English statutes existing at the time of their enactment respectively, but neither of them remained upon the statute book for a sufficient length of time to acquire a settled interpretation upon the points here discussed.

Under the act of 1800 no cases are reported touching upon the effect of general assignments. The act of 1841 had no provision directed against assignments more specific than the general enactment making "any fraudulent conveyance, assignment, sale, gift, or other transfer of lands, tenements, goods or chattels, credits or evidences of debt," an act of bankruptcy.[7] Preferential payments and transfers made in contemplation of bankruptcy were, however, declared void and a fraud upon the act, and the assignee was empowered to claim the property so conveyed.[8] In accordance with established principle, a general assignment for the benefit of preferred creditors was under this statute deemed an act of bankruptcy, even if made without moral fraud and under the importunity of creditors.[9]

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[1] U. S. Stat. at Large, vol. II, c. 19, p. 19.
[2] Ibid. p. 248.
[3] U. S. Stat. at Large, vol. V, p. 440.
[4] Ibid. p. 614.
[5] Rev. Stat. U. S. title LXI, p. 969.
[6] U. S. Stat. 1877–'78, c. 160.
[7] U. S. Stat. at Large, vol. II, c. 19, p. 19, § 2.
[8] Ibid.
[9] Ex parte Brenneman, Crabbe, 456; Freeman v. Deming, 3 Sandf. Ch. 327; McAllister v. Richards, 6 Penn. St. 133; Cornwell's Appeal, 7 W. & S. 405. For an able note on the bankruptcy acts of 1800 and 1841, and the effect of the latter on voluntary assignments for benefit of creditors with preferences, see Philips on Evidence (4th ed.) vol. III, p. 628, note 1118; see also Hutchins v. Taylor, 5 Law

Where, however, the assignments were free from objectionable preferences, the cases under this statute were not uniform as to their being acts of bankruptcy. Thus, in the case of Ex parte Potts & Garwood,[1] in the Eastern District of Pennsylvania, where a petition for an adjudication was based on an alleged act of bankruptcy in the making of an assignment of property, and it was shown that the assignment was made on a parol trust for the benefit of all the creditors ratably, Mr. Justice Randall, in refusing the adjudication, said: "An assignment for the benefit of creditors is made on good and sufficient consideration, and is perfectly valid, both at common law and under the statute: while to make it void under the second section of the bankrupt law, it must be made not only in contemplation of bankruptcy, but also for the purpose of giving a creditor, indorser, surety, or other person a preference or priority over the general creditors of the bankrupt; but when the object is, as the evidence shows it to have been here, to prevent such a preference or priority, I cannot consider the transfer as a fraud." But in the cases of McLean v. Johnson[2] and McLean v. Meline,[3] in the District of Ohio, Mr. Justice McLean was of the opinion that such assignments were acts of bankruptcy, as having been made in contemplation of a state of insolvency. The reported decisions on this point were few, and remained in conflict at the time of the repeal of the act.[4]

§ 46. *Provisions of the Act of* 1867 *applicable to General Assignments.*—The provisions of the act of 1867, to which it is necessary here to refer, relate to what conveyances are regarded as acts of bankruptcy, what bar the bankrupt's discharge, and what are voidable by the assignee in bank-

Rep. 289, Story, J.; Jones v. Sleeper, 2 N. Y. Leg. Obs. 131; Arnold v. Maynard, 2 Story, 349; Morse v. Cohannet Bank, 3 Id. 364; Everett v. Stone, Id. 446.

[1] Crabbe, 469.

[2] 3 McLean, 202.

[3] 3 McLean, 199; and see Carr v. Hilton, 1 Curtis C. C. R. 230.

[4] Mr. Justice Emmons, in Globe Ins. Co. v. Cleveland Ins. Co. 14 N. B. R. 316, remarks that, under the act of 1841, "few doctrines were more generally acquiesced in than that general assignments for the benefit of creditors had become unlawful." He cites, however, only the cases referred to in the text.

ruptcy. Section 5021 Rev. Stat. U. S. recites all the acts which subject a person to involuntary bankruptcy. Among the acts which constitute a man a bankrupt, are those of giving preference to creditors in contemplation of bankruptcy, or the making of any assignment, gift, sale, conveyance, or transfer of his estate, property, rights or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors, or the making when bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, of any gift, grant, sale, conveyance, or transfer of money, or other property, estate, rights, or credits, with the intent, by such disposition of his property, to defeat or delay the operation of the act.

By an amendment to this section[1] it is provided: "That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors."

By section 5110 it is provided that no discharge shall be granted, or if granted, shall be valid, in the following cases among others: When the bankrupt has given any fraudulent preference contrary to the provisions of the bankrupt act, or has made any fraudulent payment, gift, transfer, conveyance or assignment, of any part of his property; or if, in contemplation of becoming bankrupt, he has made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be

[1] Approved, July 26, 1876 (19 Stat. L. 102; Supp. to R. S. vol. I, 232). This is an amendment to section twelve (corresponding to § 5021 R. S. U. S.) of the amendatory act of June 22, 1874. The words quoted in the text are inserted after the word "committed," in line forty-four.

under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed in satisfaction of his debts.

By sections 5128 and 5129, certain transfers are prohibited and declared void, and the assignee is empowered to recover the property so transferred.

By the former section, all dispositions of property made by one who is insolvent, or in contemplation of insolvency, within four months[1] before the filing of the petition by or against him, to any creditor or person having a claim against the bankrupt, or who is under any liability for him, and who has reasonable cause to believe that such disposition of property is made by an insolvent and in fraud of the provisions of the bankrupt act, is declared void. By the latter section it is provided, that if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months[2] before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and knowing that such payment, sale, assignment, transfer or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this title, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this title, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt.

By section 5128 it is provided, that the fact that such a payment, pledge, sale, assignment, conveyance or other disposition of a debtor's property as is described in the two preceding sections, is not made in the usual and ordinary

[1] Rev. Stat. U. S. § 5130 a. In cases of involuntary bankruptcy, the time is limited to two months.

[2] In cases of involuntary bankruptcy four months. Ibid.

course of business of the debtor, shall be *prima facie* evidence of fraud.

§ 47. *The Power to Assign not Suspended by Bankrupt Laws.*—Before discussing these provisions more in detail, it is important to observe that, while the existence of a bankrupt law established by Congress under its constitutional powers *ipso facto* suspends and supersedes the operation of State insolvent laws,[1] in so far at least as they are in conflict with such laws,[2] yet this principle has no application to general voluntary assignments for the benefit of creditors.[3] The right to make such assignments exists independent of any statute,[4] and the various State statutes regulating the execution of such assignments, and the procedure under them are in no sense insolvent laws. There is no proper analogy between

[1] Sturgis v. Crowninshield, 4 Wheat. 122; Ogden v. Saunders, 12 Wheat. 213; Hyde v. Zacharie, 6 Pet. 638; Ex parte Eames, 2 Story, 322; In re Reynolds, 9 N. B. R. 50; Day v. Bardwell, 97 Mass. 246; see Boedefeld v. Reed, 55 Cal. 299; Lewis v. County Clerk, Id. 604; Seatle Coal Co. v. Thomas, 57 Id. 197; Rowe v. Page, 54 N. H. 190; Sadler v. Immel, 15 Nev. 265. In Lyman v. Bond (130 Mass. 291), it was held that if the effect of the New Hampshire statute of 1867, c. 126, was to bar an action upon a creditor's claim, it was an insolvent law, the operation of which was suspended by the bankrupt act; and in Lothrop v. Highland Foundry Co. (128 Mass. 120), it was held that a conveyance by way of preference, made contrary to the insolvent law, while the bankrupt act was in force, is a sufficient cause for instituting proceedings in insolvency after the repeal of the bankrupt act.

[2] Ex parte John Zergenfuss, 24 N. Ca. 463; Shryock v. Bashore, 13 N. B. R. 481; reversed on error, 15 Id. 283; s. c. 82 Penn. St. 159; Maltbie v. Hotchkiss, 38 Conn. 80; Geery's Appeal, 43 Id. 289; s. c. 17 N. B. R. 196; Beck v. Barker, 65 Penn. St. 262; Barber v. Rogers, 71 Id. 362.

[3] Cook v. Rogers, 31 Mich. 391; 13 N. B. R. 97; Thrasher v. Bentley, 59 N. Y. 649; s. c. below, 2 Sup. Ct. R. 899; Ebersole v. Adams, 13 N. B. R. 141; Hawkins' Appeal, 34 Conn. 548; s. c. 2 N. B. R. 378; Maltbie v. Hotchkiss, 38 Conn. 80; Barnes v. Rettew, 8 Phila. 133; Mayer v. Hellman, 13 N. B. R. 440; see Re Kimball, 16 N. B. R. 188; Dolson v. Kerr, Id. 405. Voluntary assignments under the State laws are valid, unless proceedings in bankruptcy are instituted within six months thereafter. Geery's Appeal, 43 Conn. 289; s. c. 17 N. B. R. 196. But an assignment, under a law of New Jersey, which "imposes restraint upon the rights to participate in the distribution of an assigned estate," inconsistent with the bankrupt act, and changing the course of administration under the act, is a conveyance in violation thereof, within the scope of section 5129. Matter of Troth, 1 Fed. Reptr. 405. Where all the creditors of a bankrupt are secured to the same extent, and in the same manner, so that no one has a preference over the others—as by an assignment, the provisions of the Bankrupt Act, discriminating between secured and unsecured creditors have no application. Matter of Backer, 2 Abb. N. C. 379.

[4] Cook v. Rogers, *supra*; Thrasher v. Bentley, *supra*; see Sadler v. Immel, 15 Nev. 265; Boese v. King, 78 N. Y. 471.

insolvent law, correctly so called, and those principles of the common law which allow and sanction the conveyance of his property by a debtor for the equal benefit of all his creditors, and no such resemblance or relation as to warrant the conclusion that, if the existence of a bankrupt law suspends the first, it must also suspend the last.[1]

§ 48. *Assignments fraudulent at Common Law, or under 13 Eliz., or giving Preferences.*—Where an assignment is fraudulent at common law,[2] or under the statutes of the State where it is made,[3] or where it attempts to create a preference[4] among creditors, it is clearly repugnant to the bank-

[1] Mr. Ch. Justice Graves, in Cook v. Ropers, 31 Mich. 396. In the case of Globe Ins. Co. v. Cleveland Ins. Co. 14 N. B. R. 316, 320, Mr. Justice Emmons has expressed a contrary view of the law. This point was however necessarily before the Supreme Court of the United States in the case of Mayer v. Hellman, *supra*, and was there distinctly ruled upon. Mr. Justice Field, after considering the Ohio statute regulating voluntary assignments, which does not vary in its character materially from statutes of other States on the same subject, remarked: "There is nothing in the act resembling an insolvent law," and it was held that the assignment, irrespective of the statute, was valid and binding at common law, although the bankrupt act was in force. In Boese v. King (78 N. Y. 471), it was held that although part of a State statute (N. J.) is in the nature of a bankrupt law, and consequently suspended by the U. S. bankrupt act, yet that fact does not affect the validity of the remainder of the law, or its effect upon the assignment; and it was further held that even if the whole of the State statute was suspended by the bankrupt act, the right of a debtor to make an equal distribution of his property among his creditors by means of a voluntary assignment still existed.

[2] Farrin v. Crawford, 2 N. B. R, 602.

[3] Hyde v. Sontag, 8 N. B. R. 225; Bean v. Amsink, Blatchford, J., Id. 335; In re Randall & Sunderland, 3 N. B. R. 26.

[4] Jackson v. McCullough, 13 N. B. R. 288; Stobaugh v. Mills, 8 N. B. R. 361; see Harris v. Exchange Nat. Bank, 4 Dillon, 133. An assignment being valid until proceedings in bankruptcy are instituted, it is not void as against a subsequent execution creditor, although it give preferences. Bostwick v. Burnett, 74 N. Y. 317. More than two months before the filing of a creditor's petition, the bankrupt transferred parts of his property to several creditors in satisfaction of their claims, he being then insolvent to the knowledge of said creditors, and he and they knowing that the transfers were intended for the purpose of preferring them over other creditors, to whom he was indebted, as indorser for his son, who was also insolvent.—*Held*, that the transfers could not be impeached as preferences under section 5128. Van Kleeck v. Miller, 19 N. B. R. 484; see also Matthews v. Stewart, 44 Mich. 209.

The assignee in bankruptcy, though he represents all the creditors of the bankrupts, acquires only the title of the bankrupts, except as he is also invested with the right of creditors to assail fraudulent transfers, and with title to property conveyed by the bankrupts contrary to the provisions of the bankrupt act. With these exceptions, his title is subject to all liens existing upon the property, legal or equitable, at the time of the commencement of the proceedings in equity. Where an assignment, fraudulent at common law, because

rupt act. The execution of such an assignment is unquestionably an act of bankruptcy, and it may be avoided by the assignee in bankruptcy.

§ 49. *Is the Making of a bona fide Assignment for Creditors ratably an Act of Bankruptcy?*—Among the earliest cases in which the question whether the execution of an assignment honestly made for the equal benefit of all creditors is an act of bankruptcy, was that of In re Wm. H. Langley,[1] in the Southern District of Ohio. The facts were, that Langley being in failing circumstances, and judgments being about to be recovered against him, executed an assignment of all his estate for the equal benefit of his creditors, in compliance with the various statutory requirements of the Ohio statute in reference to such assignments. Within a month thereafter, Perry filed a petition against him in the District Court, setting forth the assignment, and claiming that it was made with the intent to

made with the intent to hinder and delay creditors, was set aside at the suit of the assignee in bankruptcy, it was held that the latter took the assigned property subject to the liens of judgment creditors which had attached subsequent to the assignment. Johnson v. Rogers, 15 N. B. R. 1. If, however, a creditor, by reason of exceptional circumstances, is precluded from assailing the assignment, as to him it is as valid as it is to the assignors and to the assignees who have accepted it. Thus when creditors have concurred in the execution of the assignment, they cannot be heard to allege that it was fraudulent because of facts of which they were fully informed when they gave assent; they cannot impeach a transaction for fraud in which they participated as parties. Steel v. Brown, 1 Taunt. 381; Philips v. Wooster, 36 N. Y. 412; Johnson v. Rogers, *supra*.

Where the assignment was held void as against an assignee in bankruptcy, because regarded as repugnant to the bankrupt law, although otherwise valid—held that an execution creditor, under a judgment obtained after the assignment took effect and before the filing of the petition in bankruptcy, secured a preference over the title of the assignee in bankruptcy. Macdonald v. Moore, 1 Abb. N. Cas. 53; s. c. 15 N. B. R. 26; see Dolson v. Kerr, 16 Id. 405; Re Beadle, 5 Sawyer, 351.

It is said, however, that Johnson v. Rogers, and Macdonald v. Moore, are in conflict (Re Beisenthal, 14 Blatch. 146; s. c. 15 N. B. R. 228) where the former of the two cases followed. A voluntary assignment was made, and the assignee accepted and qualified. Afterward a creditor recovered judgment, and the sheriff seized the property. After that an assignee in bankruptcy was appointed. —*Held*, that the judgment creditors had no lien upon, or right in the assigned property, so as to be let in to intercept, and take precedence of, the right of the assignee in bankruptcy to the property when he exercised his right to avoid the assignment, and to recover the property. Re Beisenthal, *supra*; Linder v. Lewis, 19 N. B. R. 455; Re Walker, 18 Id. 56; Belden v. Smith, 16 N. B. R. 302; Reed v. McIntyre, 98 U. S. 507.

[1] 1 N. B. R. 559; s. c. on appeal, 2 N. B. R. 596.

hinder and delay him in the collection of his debt, and also with intent, by such disposition, to defeat and delay the operation of the bankrupt law, and that it was therefore an act of bankruptcy.

The District Court (Mr. Justice Leavitt) regarded the assignment as in contravention of the spirit and policy of the bankrupt law, although admitted to be made in good faith, and rested its decisions on the English cases and upon the decisions in McLean v. Meline,[1] McLean v. Johnson,[2] and Shawhan v. Wherritt,[3] and upon the further ground that the particular creditor was hindered and delayed in the collection of his debt. The case was taken to the Circuit Court, where Mr. Justice Swayne delivered an opinion which unfortunately is not reported in full.[4] From the abstract given he appears to have decided:

"That where a creditor is about to recover a judgment against his debtor in Ohio, and the debtor makes a general assignment of all his property for the benefit of all his creditors before the judgment is rendered, such conveyance is not necessarily a conveyance with the intent to hinder, defraud or delay creditors. And where such assignment is made under like circumstances, with intent to secure an equal distribution of all the debtor's property among all his creditors, it is not necessarily a conveyance of property with intent to defeat or delay the operation of the bankrupt act. To make such assignment an act of bankruptcy, it must be made with intent to delay, defraud or hinder creditors within the meaning of 13 Elizabeth, or with intent to defeat or delay the operation of the bankrupt act. It becomes a question of fact. The innocence or guilt of the act depends upon the mind of him who did it, and it is not a fraud within the meaning of the bankrupt law, unless it was meant to be so."[5]

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[1] 3 McLean, 190. [2] 3 McLean, 202. [3] 7 How. 627.

[4] Reported *sub. nom.* Langley v. Perry, 2 N. B. R. 596.

[5] This opinion has been criticised as not having been necessary to the determination of the case (see Emmons, J., in Globe Ins. Co. v. Cleveland Ins. Co. 14

The opinion thus expressed was subsequently reviewed and approved by the same learned judge, in the case of Farrin v. Crawford,[1] where he said: "Now, while I have held, and still emphatically hold, that an assignment, such as this purports to be (made for the equal benefit of all creditors), is valid and proper when made in good faith, it is yet to be subjected to the sharpest scrutiny, and any badge of fraud that attaches itself in the light of extraneous circumstances will, unless fully and satisfactorily explained, be fatal to its validity, and the arm of the bankrupt law will sweep it away and subject the person and estate to its own provisions." It was consequently held in that case that, where the assignor had reserved to himself a sum of money largely in excess of the amount exempt, this fact, taken in connection with other suspicious circumstances, was such a badge of fraud as to render the assignment fraudulent and create an act of bankruptcy. In harmony with these opinions is that expressed by Mr. Justice Nelson, in the case of Sedgwick v. Place,[2] in the Circuit Court for the Southern District of New York. In that case, where an assignment untainted with fraud has been duly executed, and the requirements of the statute of the State of New York regulating such assignments had been complied with, and the assignees in bankruptcy, under a subsequent voluntary assignment, filed their bill in equity seeking to have such assignment set aside, and, in the meantime, applied for an injunction restraining the voluntary assignees from proceeding with the administration of the trust, the circuit judge, in denying the application for an injunction, said: "Assuming the assignment in question to be untainted with fraud, either against creditors or against the bankrupt act, which is the present position of the case, we find nothing in the provisions of the

N. B. R. 314; Cadwalader, J., in Barnes v. Rettew, 8 Phila. 141). The assignment under which the question arose appears to have been recorded under the laws of Ohio five days before the bankrupt act took effect, and the opinion of the court below, that the statute was retroactive, might have been a sufficient ground of reversal.

[1] 2 N. B. R. 602.

[2] 1 N. B. R. 673.

law which would authorize us to take this property out of the hands of the assignee under the State law, and turn it over to the assignee in bankruptcy."

§ 50. While these cases have in some instances been followed and approved,[1] yet their authority has been frequently questioned, and in the majority of instances entirely dissented from.[2] The question, however may still be regarded as open and undetermined.

The leading cases which uphold the doctrine that such assignments are acts of bankruptcy, are Barnes v. Rettew,[3] and the late case of Globe Ins. Co. v. Cleveland Ins. Co.[4]

In the former of these cases, decided in the Circuit Court for the Eastern District of Pennsylvania, Mr. Justice Cadwalader delivered an able and careful opinion,[5] in which he looked into the English cases and reviewed the subject on principle and on authority. Advancing upon the theory that the judicial interpretation of an act forms a part of it, and that Congress in enacting the law of March 2, 1867, modelling it to a large degree upon the English bankruptcy law, adopted the approved construction of that law in its relation to general assignments,[6] he proceeds to show that under the English system general assignments, though made for the equal benefit of all creditors, were regarded as acts of bankruptcy, and that the reason for that rule was that by such an act the debtor attempted to put his estate into a course of

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[1] In re Kintzing, 3 N. B. R. 217; In re Charles J. Marter, 12 N. B. R. 185; Smith v. Teutonia Ins. Co. 4 C. L. N. 130; and see In re George H. Arledge, 1 N. B. R. 648; In re George A. Hawkins, 2 N. B. R. 378; In re Alfred L. Wells, Jr. 1 N. B. R. 171; see also Mayer v. Hellman, 18 N. B. R. 440.

[2] In re Randall & Sunderland, 3 N. B. R. 18; s. c. Deady, 527; In re Smith, 3 N. B. R. 377; s. c. 4 Ben. 1; s. c. 1 L. T. R. 147; In re Spicer & Peckham, 3 N. B. R. 512; Rettew v. Barnes, 8 Phila. 133; In re Burt, 1 Dillon, 439; Hobson v. Markson, Id. 421; and see In re Goldschmidt, 3 N. B. R. 164; Burkholder v. Stump, 8 Phila. 172; In re The Union Pacific R. R. Co. 10 N. B. R. 178; In re Brodhead, 2 N. B. R. 278; In re Stubbs, 4 N. B. R. 376; In re Mendelsohn, 12 N. B. R. 533; Globe Ins. Co. v. Cleveland Ins. Co. 14 N. B. R. 311.

[3] *Supra.* [4] *Supra.*

[5] Concurred in by Mr. Joseph McKennan.

[6] See Globe Ins. Co. v. Cleveland Ins. Co. 14 N. B. R. 324.

distribution different from that prescribed by the bankrupt act, which had been the substance of the language of Lords Mansfield, Eldon and Wensleydale, and which are words of like import of those employed in the statute, to wit: "with intent to delay or defeat the operation of this act."

In addition, he emphasizes the inconvenience which would arise from permitting general assignments under the various State acts to be made *pari passu* with the bankrupt act, and attempts to distinguish the cases of Langley v. Perry[1] and Sedgwick v. Place.[2]

In the case of Globe Ins. Co. v. Cleveland Ins. Co.,[3] in the Circuit Court for the Northern District of Ohio, Mr. Justice Emmons considered the question very fully. In addition to the grounds of decision adopted by Mr. Justice Cadwalader, he argues at length to show that the principle which underlies the doctrine that State insolvent laws are suspended by the operation of the bankrupt act, necessarily involves the determination that general assignments are in conflict with that act, and are prohibited by it.[4] The opinion reviews the English and American cases, and is an important and instructive discussion of the question, reversing the rule formerly prevailing in that circuit.

In the case of Randall and Sunderland,[5] in the District of Oregon, Mr. Justice Deady placed his decision upon the ground that the necessary consequence of the assignment would be to prevent the assignor's property from coming to the assignee in bankruptcy, and from being distributed among his creditors under the bankrupt act, and thus the operation of the act would be defeated; and since every person is presumed to intend the natural and probable consequences of his own act, the intent of the assignor must have been to defeat the operation of the bankrupt act. The assignment in that case was a clear act of bankruptcy, inasmuch as it appears to have been invalid and fraudulent upon its face.

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[1] 2 N. B. R. 596. [2] 2 N. B. R. 28. [3] 14 N. B. R. 311.
[4] See *ante*, § 47 and notes. [5] 3 N. B. R. 18.

In the Northern District of New York, the question was presented in the case of In re Wells, Jr.,[1] but was not deemed essential to a determination of the case. In the later case, in the same district, of In re Smith,[2] an assignment was declared an act of bankruptcy because it defeats the operation of the bankrupt act in depriving the creditors of the right to select an assignee, and in taking from the bankrupt court the supervision of the assignee and the administration of the estate. In Goldschmidt's[3] case, in the Southern District of New York, where a debtor who was insolvent, and while actions were pending against him, and more than six months before the commencement of proceedings in bankruptcy, made a general assignment, it was held that the inference from these facts was that the assignment was made with the intent to hinder and delay creditors, and was therefore a bar to the bankrupt's discharge. The question was raised in the case of the Union Pacific Railroad Company,[4] in the District of Massachusetts, and although the decision turned upon another point, yet Mr. Justice Lowell made these observations: "I consider the better opinion under our bankrupt law to be the same (as the English doctrine), that it forbids such a distribution by means of a private trust created by the debtor, unless all his creditors consent. Various reasons are given, the substance of which is that if an estate is to be wound up by trustees, they should be appointed by and be subject to the order of the courts having jurisdiction of the subject-matter, and that the creditors should have a voice in their appointment. Putting a person into bankruptcy who has undertaken to have his affairs wound up in this way, is scarcely more than a specific performance of the trusts he has himself created. The only general proposition that can safely be laid down, is one which I mentioned before, that one who is not only insolvent, but who undertakes to make a final distribution of

[1] 1 N. B. R. 171.
[2] 3 Id. 164.
[3] 3 Id. 377.
[4] 10 Id. 178.

his assets, must do it through the bankrupt court." And in a late case[1] in the District of California, it was remarked that the weight of authority is decided that even a fair general assignment for the benefit of creditors is an act of bankruptcy, because it necessarily defeats the operation of the act, and hinders and delays creditors.

Quite recently the question was discussed before the Supreme Court of the United States,[2] and Mr. Justice Field, in delivering the opinion of the court, made these observations: "The counsel for the defendants have filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the bankrupt act, though made within six months previous to the filing of the petition. Their argument is that such an assignment is only a voluntary execution of what the bankrupt court would compel; and as it is not a proceeding in itself fraudulent as against creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice Nelson, in the Circuit Court of New York, in Sedgwick v. Place, 1 N. B. R. 673, and of Mr. Justice Swayne, in the Circuit Court of Ohio, in Langley v. Perry, 2 N. B. R. 596. Certain it is that such an assignment is not absolutely void; and if voidable it must be because it may be deemed perhaps necessary, for the efficiency of the bankrupt act, that the administration of an insolvent's estate shall be intrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent. It is unnecessary to express any decided opinion upon this head, for the decision of the question is not required for the disposition of the case."

The ultimate rule to be deduced from the cases which hold that such assignments are acts of bankruptcy, is well expressed in the language of Mr. Justice Lowell, "that one

[1] In re Mendelsohn, 12 N. B. R. 533.

[2] Mayer v. Hellman, 13 N. B. R. 440.

who is insolvent, and who undertakes to make a final distribution of his assets, must do it through the bankrupt courts,"[1] a rule which is adduced from no affirmative mandate of the statute, but which arises, if at all, by implication from judicial determination, that every other method of distribution must necessarily either delay and defraud creditors or hinder and defeat the operation of the bankrupt act.

§ 51. It is proper here to refer to a proposition which has been frequently maintained and applied, to wit, that there is a legal duty imposed upon an insolvent by the existence of the bankrupt act, to avail himself of its provisions for the benefit of his creditors. This doctrine has found expres-

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[1] Mr. Justice Lowell, In re The Union Pacific R. R. Co. 10 N. B. R. 178. In Platt v. Preston, 19 N. B. R. 241, Choate, J., says: "The great weight of authority at present is, that a general assignment for the benefit of creditors without preferences is necessarily a fraud under the bankrupt law, defeating the operation of the law, because it provides for the administration of the estate in a different way from that provided by the bankrupt law, and by an assignee selected by the bankrupt himself." Re Beisenthal, 14 Blatch. 146; s. c. 15 N. B. R. 228; Harding v. Crosby, 17 Blatch. 348; Re Croughwell, 17 N. B. R. 337; Linder v. Lewis, 19 N. B. R. 455; Re Temple, 17 Id. 345; Re Skoll, 16 Id. 175; Re Croft, 17 Id. 324; Re Frisbee, 14 Blatch. 185.

The intent to have the debtor's estate wound up and distributed under a general assignment constitutes an intent to prevent the property from coming to the assignee in bankruptcy and of being distributed under the bankrupt law. Re Kraft, 4 Fed. Reptr. 523; see Re Seeley, 19 N. B. R. 1; Re Kasson, 18 Id. 379. The defective execution of a voluntary assignment does not prevent its being an act of bankruptcy. Re Lawrence, 18 N. B. R. 516.

A general assignment, though under a State law and without preferences, is void as against an assignee in bankruptcy if the petition in bankruptcy is filed in season. Macdonald v. Moore (U. S. Dist. Ct. S. Dist. of N. Y.) 1 Abb. N. Cas. 53; s. c. 15 N. B. R. 56.

Where a debtor executed an assignment valid under the laws of the State of New York, and without preferences, on the 9th day of January, 1872, and on the 18th day of May, 1872, was adjudged bankrupt, in an action brought by the assignee in bankruptcy to obtain possession of the assigned property,—held that the assignment did not contravene any of the provisions of the bankrupt act. Miller, J.: "In Tiffany v. Lucas (15 Wall. U. S. 410, 412), it was held that two things must concur to bring an assignment within the jurisdiction of the bankrupt act, viz., the fraudulent design of the bankrupt and the knowledge of it on the part of the assignee. Neither of these features characterize the case at bar. The admission and proof establish that there was no such design or knowledge, in fact, that all the parties acted in entire good faith and with no intent to violate the provisions of the act. The principle is settled in this court (N. Y. Court of Appeals), that, where the debtor has not been proceeded against, or taken any proceedings in the bankrupt court, an assignment for the benefit of creditors is not an instrument void *per se* in hostility to the bankrupt act." Haas v. O'Brien, 1 Abb. N. Cas. 173; s. c. 66 N. Y. 507; 16 N. B. R. 508; Von Hein v. Elkus, 15 N. B. R. 194; Coates v. First Nat. Bank, 47 N. Y. Super. Ct. 322.

sion in the dicta of many able judges, and was made the foundation of a course of decisions in a very important class of cases.

Thus, it has been said, "strictly and truthfully speaking, an insolvent has no property, and therefore he has no natural right to dispose of his property in his possession otherwise than with the consent of the real owners—his creditors."[1] Again, "at the date of the assignment, Holloman was insolvent, and he knew it. It was his duty to go into bankruptcy;"[2] and in the case of Wilson v. The City Bank,[3] and other analogous cases,[4] it was for the time maintained that the silent acquiescence of the debtor, without invoking the protecting shield of the bankrupt act, in permitting a creditor to obtain judgment and secure a lien when the debtor was insolvent and known so to be by the creditor, was a fraud upon the bankrupt act. This doctrine, however, failed to meet the approval of the Supreme Court of the United States.[5]

Mr. Justice Miller, in delivering the opinion of that court, in the case of Wilson v. City Bank, on appeal, said,[6] "It is said, however, that the grand feature of that law (the bankrupt law), is to secure equality of distribution among creditors in all cases of insolvency, and to secure this it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a voluntary bankrupt, and that this duty is one to be inferred from the spirit of the law and is essential to its successful operation. The argument is not without force, and has received the assent of a large number of the district judges to whom the administration of the

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[1] Mr. Justice Deady, In re Silverman, 1 Saw. 416.

[2] Mr. Justice Woods, in Jackson v. McCulloch, 13 N. B. R. 285; and see remarks of Mr. Justice Blatchford, in Hardy v. Clarke, 8 N. B. R. 392.

[3] 5 N. B. R. 270.

[4] Warren v. Tenth Nat. Bk. 7 N. B. R. 481; Smith v. Buchanan, 8 Blatch. 153; Haskell v. Ingalls, 5 N. B. R. 205; Catlin v. Hoffman, 2 Sawyer, 486; see Rogers v. Palmer, 102 U. S. 263.

[5] Wilson v. City Bank, 17 Wall. 473. [6] Ibid. 484, 485.

bankrupt law is more immediately confided. We are, nevertheless, not satisfied of its soundness.

"We have already said there is no moral obligation on the part of the insolvent to do this unless the statute requires it, and then only because it is a duty imposed by the law. It is equally clear that there is no such duty imposed by that act in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all* cases of insolvency, and, to make the argument complete, it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it, in effect, forbid all proceedings to collect debts in cases of insolvency in other courts, and in all other modes than by bankruptcy? We do not think that its purpose of securing equality of distribution is to be carried so far."

§ 52. Inasmuch, then, as there is no legal duty imposed upon an insolvent, by the mere fact of insolvency, to resort to bankruptcy, and since no legal rights are acquired by creditors to their debtor's property solely by his insolvency, it would appear that an insolvent debtor may make any disposition of his property not prohibited by law,[1] but a general assignment for the benefit of all his creditors equally is not prohibited by law; on the contrary, "whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding."[2]

The only provisions of the bankrupt act under which it has been or can be claimed that an assignment honestly made for the equal benefit of all creditors is an act of bankruptcy, are the clauses of section 5021, respecting fraudulent conveyances, to wit, assignments, &c., made by a debtor,

[1] Mr. Justice Baldwin, in Davis v. Turner, 4 Gratt. 426; see also Stewart v. Platt, 101 U. S. 731.

[2] Mr. Justice Field, in Mayer v. Hellman, 13 N. B. R. 442.

with the intent to delay, defraud, or hinder his creditors, and the subsequent clause of the same section in reference to conveyances by an insolvent made with the intent to defeat or delay the operation of the act.[1] For the bankruptcy courts to declare such an assignment as has been described a fraudulent conveyance, under the former of these clauses, would be to disregard the authority of courts of law and equity in this country, upon the construction of the words employed from the earliest time, and no decision of the bankruptcy courts in this country has ever gone fully to this length.[2] The opinions adverse to such assignments have, for the most part, been rested upon the latter clause of the section. The words "with intent to defeat or delay the operation of the act," appear for the first time in the bankrupt act of 1867, and they have not acquired a distinct and definite interpretation. It is difficult to perceive how any act of a debtor can be said to defeat or delay the operation of a law in the abstract. The words have ordinarily been regarded as referring to the rights of creditors secured under or by the operation of the act. But to say that an assignment honestly made for the equal benefit of all creditors is an act of bankruptcy because it defeats or delays the operation of the act, by depriving creditors of the right to administer the estate of an insolvent, is to say that it is an act of bankruptcy because it deprives them of a right which they have not yet acquired, and which they cannot acquire, except by an appeal to the court in certain numbers and under peculiar circumstances, and the mere insolvency of their debtor is not one of those circumstances.

But if it be said that the rights of creditors protected by this clause are prospective rights which will spring into existence when the insolvent shall be brought under the operation of the act, then every interference by a debtor with his property after his insolvency is equally an act of bank-

[1] See *ante*, § 46.

[2] See remarks of Mellish, L. J., in Ex parte Luckes in re Wood, 36 L. T. Chan. 117, quoted *ante*, § 42, note; Field, J., in Mayer v. Hellman, 18 N. B. R. 442.

ruptcy, since every such interference, to the extent to which it goes, as effectually prevents the property of the insolvent from coming into the hands of the assignee in bankruptcy, and from distribution under the act, as does a general conveyance of his entire estate. Such a proposition is tantamount to affirming that insolvency itself is an act of bankruptcy.

When it is asserted that the clause under consideration was inserted into the act from the English decisions, and is equivalent to the language of Lord Eldon, "puts his property under a course of distribution different from that ordained by the bankrupt law,"[1] it may well enough be replied, that admitting the analogy between the phrases (although not entirely apparent), still no intent on the part of the legislature to adopt the English rule on this subject can be gathered from the discussion of the act during its progress through Congress, and it is not to be presumed that a rule of law which was declared by the eminent chancellor who first formulated it, to have been placed on a "singular ground," and to have been "carried to an extravagant length,"[2] and the force of which has been materially affected by the amendments to the bankrupt acts in existence at the time of the passage of the act of 1867, was incorporated into that law without more pointed reference to it either in the act itself or in the extended discussion which the passage of the act provoked.

If assignments, honestly made for the equal benefit of all creditors, and carrying out the beneficial design of the bankrupt law, were regarded by Congress as antagonistic to that law, it is somewhat surprising that conveyances so familiar to the law of this country should have been referred to only under the indirect phraseology employed.

§ 53. *Assent of Creditors.*—Under the English decisions it has been uniformly held, that a creditor who has either executed, or been privy to, or acted under, a deed of assign-

[1] See *ante*, § 42. [2] Lord Eldon, in Ex parte Bourne, 16 Ves. 148.

ment, cannot afterwards set it up as an act of bankruptcy.[1] And so a creditor who, by standing by and not objecting, assents to the execution by the debtor of the assignment, cannot afterwards rely on its execution as an act of bankruptcy.[2] And this rule is believed to prevail in this country, though perhaps not to the same extent. Thus where a debtor caused his property to be transferred to trustees for the payment of certain specified debts, and was subsequently adjudged bankrupt, it was held that the creditors secured by the assignment might dissent therefrom and prove their debts, but in the absence of an actual dissent, creditors preferred under an assignment will be deemed to assent to its provisions, and cannot prove their claims without surrendering the preference.[3]

But where an application for an adjudication of bankruptcy was made against the debtor, and the acts of bankruptcy alleged were that the debtor, being a merchant, had suspended payment of his commercial paper, and had not resumed within a period of fourteen days, and it appeared that, before the expiration of the fourteen days, the debtor had made an assignment for the benefit of creditors under the Ohio statute, it was held that the assignment did not prevent the running of the fourteen days; held, also, that the fact that the State court had acquired jurisdiction of the debtor's estate did not prevent the bankrupt court from proceeding under the bankrupt law, no fraud having been shown in the assignment.[4]

§ 54. *Assignment not Void but Avoidable in Bankruptcy.*—In the absence of actual fraud, the assignment, even

[1] Bamford v. Baron, 2 Term R. 594, note; Ex parte Cawkwell, 1 Rose, 313.

[2] Ex parte Stray, L. R. 2 Chan. 374; Marshall v. Barkworth, 4 B. & Adol. 508; Jackson v. Irvine, 2 Camp. 49; Oliver v. King, 25 L. J. Chan. 427; Ex parte Strang, L. R. 2 Ch. Ap. 374; see Bradley, J., Barings v. Dabney, 19 Wall. 9.

[3] In re W. A. Sanders, 18 N. B. R. 164. And where the petitioning creditor applied to the State court to have the security of the voluntary assignee increased, this was not such an assent to the proceedings as to estop him from claiming that the assignment was an act of bankruptcy. In re William H. Langley, 1 N. B. R. 559.

[4] In re Laner, 9 N. B. R. 494.

though constructively fraudulent, is not void, but voidable, in bankruptcy, and is voidable only at the suit of the assignee,[1] but transfers void under the law of the State where the transfer is made, or fraudulent at common law, may be avoided by the assignee in bankruptcy, though made more than six months prior to proceedings in bankruptcy.[2] Conveyances and transfers, however, which are fraudulent by virtue of sections 5128 and 5129, can be impeached only when proceedings in bankruptcy are commenced within the time limited by section 5130 a.[3]

The pleadings may be so framed as to assail the instrument, both because fraudulent under the bankrupt act and under the common law, or under the statute of the State.[4]

§ 55. *Avoiding Assignment by Assignee.*—The bankrupt law, section 5046, Rev. Stat. U. S., declares that all the property conveyed by a bankrupt in fraud of his creditors, shall, by virtue of adjudication of bankruptcy, and the appointment of his assignee, but subject to the exceptions stated in the previous section, be at once vested in such assignee.

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[1] In re George H. Arledge, 1 N. B. R. 644; McGready v. Harris, 9 N. B. R. 135; Mayer v. Hellman, 13 N. B. R. 440; Cadwalader, J., In re Pierce & Holbrook, 3 N. B. R. 258; and see Barnes v. Rettew, 8 Phila. 133; Ostrander v. Meunch, 2 McCrary, 267; Belden v. Smith, 16 N. B. R. 302; Reed v. McIntyre, 98 U. S. 507; Re Temple, 17 N. B. R. 345. In Shryock v. Bashore (82 Penn. St. 159; s. c. 15 N. B. R. 283), the assignees of an insolvent bank brought an action against the maker of a note to the bank. *Held*, that he could not be permitted to set up as a defense that the assignment was void, as being contrary to the bankrupt act. Where the voluntary assignee sues to recover money due the assignor, and the assignee in bankruptcy is brought in by interpleader, the latter, in order to recover, must establish that the voluntary assignment was not merely void at his election, but so absolutely void that the plaintiff's title under it can be assailed and defeated collaterally; this position is not tenable. The voluntary assignment is not void *ab initio*, even as against the assignee in bankruptcy, but voidable at his election, and he must elect to treat the assignment as void *in toto* or not at all. Wehl v. Wald, 18 Blatch. 163.

[2] Massey v. Allen, 17 Wall. 351; s. c. 7 N. B. R. 401; Bean v. Amsinck, 8 N. B. R. 235; Hyde v. Sontag, 8 N. B. R. 225; Bean v. Brookmire, 1 Dillon, 151; s. c. 4 N. B. R. 57; Knowlton v. Mosely, 105 Mass. 136; Bradshaw v. Klein, 1 N. B. R. 542; s. c. 1 L. T. R. 72; s. c. 7 A. L. Reg. 505; Cragin v. Carmichael, 11 N. B. R. 511; see Olney v. Tanner, 19 N. B. R. 178; Mann v. Flower, 25 Minn. 500.

[3] Mayer v. Hellman, 13 N. B. R. 440; In re George H. Arledge, 1 N. B. R. 644; Seaver v. Spink, 8 N. B. R. 218; Geery's Appeal, 43 Conn. 289; s. c. 17 N. B. R. 196; Maltbie v. Hotchkiss, 38 Conn. 80; Re Temple, 17 N. B. R. 345; Barnewell v. Dunn, 14 N. B. R. 278.

[4] Cragin v. Carmichael, 11 N. B. R. 511.

The assignee, therefore, not only succeeds to the rights and liabilities of the bankrupt, but he also represents the rights of the creditors, and, as such representative, may maintain and defend proceedings which, on grounds of public policy or otherwise, the latter would not be allowed to.[1] He has the rights which an attaching creditor would have.[2] He may attack an assignment on the same grounds on which a creditor, having obtained judgment, might attack it.[3] "He may," says Mr. Justice Woodruff, "impeach any conveyance and recover any property which, were there no bankrupt law, the creditors (having first obtained judgment), might impeach and recover on the ground that it was conveyed, or transferred, to defraud them."[4]

But he may also attack an assignment upon grounds upon which a judgment creditor could not, as giving a preference or being fraudulent under the provisions of the bankrupt act.[5] But in that event he is restricted in his right of

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[1] In re The St. Helen's Mills Co. 10 N. B. R. 418; In re Wynne, 4 N. B. R. 23; Allen v. Massey, 7 N. B. R. 401; s. c. on appeal, 17 Wall. 351; Carr v. Hilton, 2 Story, 231; Black v. Terrin, 2 N. B. R. 643. An action may be maintained by the assignee in bankruptcy against a voluntary assignee and intervening creditors to avoid the assignment and recover of such creditors the avails of the property levied upon and sold by them. Linder v. Lewis, 19 N. B. R. 455. The bankrupt cannot set up in defense to the claim of the assignee the title of a prior assignee under a voluntary assignment, merely for the purpose of retaining property in his own possession. Matter of Moses, 1 Fed. Reptr. 845.

[2] Cragin v. Carmichael, 11 N. B. R. 511.

[3] Farrin v. Crawford, 2 N. B. R. 602; In re Randall & Sunderland, 3 N. B. R. 18; Massey v. Allen, 17 Wall. 351; Bean v. Amsinck, 8 N. B. R. 235; Knowlton v. Moseley, 105 Mass. 136; In re Wynne, 4 N. B. R. 23; s. c. 9 A. L. Reg. 627; Bradshaw v. Kline, 1 N. B. R. 542; s. c. 2 Biss. 20; In re Metzger, 2 N. B. R. 353; In re Meyers, 1 N. B. R. 581; s. c. 2 Ben. 424; Boone v. Hall, 7 Bush, 66; Pratt v. Curtiss, 6 N. B. R. 139; Carr v. Gale, 3 W. & M. 38; s. c. 2 Ware, 330; Carr v. Hilton, 1 Curt. 230; Ashley v. Robinson, 29 Ala. 112.

[4] Smith v. Ely, 10 N. B. R. 554. Where a general assignment was held void as against the assignee in bankruptcy, it was also held that his title related back to the date of the general assignment, and cut off the lien of a creditor whose execution was levied on goods subsequently thereto, and before the filing of the creditors' petition. Waring v. Buchanan, 19 N. B. R. 502; see cases cited with Re Beisenthal, in note 3 of § 48.

[5] Jackson v. McCulloch, 3 N. B. R. 283; see *ante*, § 48. All the persons uniting in a common design to effect a fraudulent disposition of the bankrupt's property may be joined as defendants in one suit brought by the assignee, although the relief sought against them respectively relates to different parts of the estate. Van Kleeck v. Miller, 19 N. B. R. 484.

maintaining his action by the time in which the proceedings in bankruptcy were commenced after the fraudulent act complained of, and if the proceedings were not instituted within the time limited, his right of action is lost.[1] And when the action is brought to avoid a transaction as fraudulent under the provisions of the bankrupt act, it may be brought in a State court.[2]

§ 56. *Right of Action in Assignee Exclusive.*—After the commencement of proceedings in bankruptcy, no one but the assignee can bring or maintain an action to set aside a fraudulent conveyance made by the bankrupt.[3] The right of action to set aside such a conveyance is, after an adjudication in bankruptcy, exclusively in the assignee, and the judgment creditor cannot maintain an action thereon; and this is true even when the creditor had no notice of the proceedings in bankruptcy, and when his debt was not included in the schedules.[4] And when a trustee, claiming under an assignment, filed a bill to recover assets belonging to the estate, the assignee in bankruptcy was permitted to intervene by supplemental bill.[5]

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[1] Seaver v. Spink, 8 N. B. R. 218; Mann v. Flower, 25 Minn. 500; Tappan v. Whittemore, 15 Blatch. 440; Coates v. First Nat. Bank, 47 N. Y. Super. Ct. 322.

[2] A State court has jurisdiction of an action by an assignee in bankruptcy to recover a debt due the bankrupt (Kidder v. Horrobin, 72 N. Y. 159; Mann v. Flower, 25 Minn. 500), or to avoid transactions which constitute a fraud on the bankrupt act (Ansley v. Patterson, 77 N. Y. 156; Olcott v. MacLean, 78 Id. 223; Thompson v. Sweet, Id. 622; Goodrich v. Wilson, 119 Mass. 429; Tyler v. Wing, 19 Hun, 622; Wente v. Young, 12 Id. 220; see Claflin v. Houseman, 93 U. S. 130; Cook v. Whipple, 55 N. Y. 150; but see Bingham v. Claflin, 7 N. B. R. 412; Voorhees v. Frisbie, 8 Id. 152; Cornwell's Appeal, 7 W. & S. 305); and on the refusal of the assignee, creditors may bring such an action in a State court (Bates v. Bradley, 24 Hun, 84; distinguishing Glenny v. Langdon, 98 U. S. 20); but State courts have no jurisdiction of an action against the assignee to reach the bankrupt's assets in his hands. Griswold v. Watkins, 20 Hun, 114. The jurisdiction of the bankrupt court is not affected by the fact that an assignment for the benefit of creditors under the State law has been made prior to the adjudication. Pool v. McDonald, 15 N. B. R. 560.

[3] In re Myers, 1 N. B. R. 581; s. c. 2 Ben. 424; Stewart v. Isidor, 1 N. B. R. 485; s. c. 5 Abb. Pr. N. S. 68; Goodwin v. Sharkey, 3 N. B. R. 485; s. c. 5 Abb. Pr. N. S. 64; Allen v. Montgomery, 10 N. B. R. 503.

[4] Thurmond v. Andrews, 13 N. B. R. 157.

[5] Collateral Bank v. Fowler, 12 N. B. R. 289; see Freeman v. Deering, 3 Sandf. Ch. 327; Wehl v. Wald, 18 Blatch. 103.

And a creditor cannot disregard the assignment and levy upon the property transferred by it, although it is void under the bankrupt law, for it is void only as to persons claiming in virtue of proceedings under the statute.[1]

Nor can the voluntary assignee claim that the assignment is void under the bankrupt law, without showing that the property has been recovered from him by the assignee in bankruptcy.[2]

§ 57. *Proceedings under Voluntary Assignments, when Avoided—Protection of Voluntary Assignee.*—Where the assignment is set aside the bankrupt court will sometimes, to facilitate the administration of the estate, recognize the voluntary assignee, and refuse to interfere with him pending certain transactions which are deemed to be of advantage to the estate.[3] In the case of In re Pierce & Holbrook,[4] Mr. Justice Cadwalader, referring to this subject, remarked, "Even when the assignment has been the sole foundation of the proceedings in bankruptcy, I have considered it not a void act, but an act voidable by the assignee in bankruptcy under a bill in equity filed for the purpose of avoiding it, and have sustained acts done under it previously in good faith. In one case I refused an injunction under such a bill, because the injunction would have prevented the working out of an equity beneficial to the creditors. In another case I suspended granting an injunction and appointing a receiver until the completion of a beneficial sale by the assignee under a previous deed. In a third case, of a very suspicious kind, where a sale had apparently been forced by the assignee under the previous deed, at a sacrifice, and the bill was at the suit of the petitioning creditor before the appointment of an assignee in bankruptcy, as the previous assignee was of questionable solvency, and might be liable

[1] Dodge v. Sheldon, 6 Hill, 9.
[2] Seaman v. Stoughton, 3 Barb. Ch. 344; see Re Manahan, 19 N. B. R. 65.
[3] Burkholder v. Stump, 8 Phila. 172; s. c. 4 N. B. R. 597.
[4] 3 N. B. R. 258.

for the full value of what had been sacrificed, I made a qualified and guarded order for a receiver." And where, previous to the commencement of an action on the part of the assignee in bankruptcy to obtain possession of the assigned property, the voluntary assignee sold the property assigned to him, and distributed the proceeds under the orders of the State court, acting in good faith and deriving no interest or benefit therefrom himself, the United States Circuit Court for Iowa held the voluntary assignee free from liability in an action subsequently brought by the assignee in bankruptcy to recover the value of the assigned property.[1]

§ 58. *Allowance of Expenses to Voluntary Assignee.*— The assignee claiming under a voluntary assignment is not chargeable with the value of property in good faith turned over to creditors, or payments made to creditors in accordance with the terms of the assignment before proceedings in bankruptcy were instituted; but he is liable for the balance which shall appear to be in his hands upon a proper accounting with the assignee in bankruptcy, after deducting such payments.[2]

The expenses of converting the property into money may be allowed to a trustee under an assignment,[3] and in the case of Burkholder v. Stump,[4] the court directed an al-

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[1] Cragin v. Thompson, 12 N. B. R. 81. But in this case Mr. Justice Dillon said, "If the present action were against the creditors who received dividends under the assignment, there could, as it now seems to me, be little or no doubt as to their liability." See Neill v. Jackson, 8 Fed. Reptr. 144; Wehl v. Wald, 18 Blatch. 163; Wald v. Wehl, Id. 495.

[2] Jones v. Kinney, 4 N. B. R. 649.

[3] In re J. S. Cohen, 6 N. B. R. 379; Stobaugh v. Mills, 8 N. B. R. 361; s. c. 5 C. L. N. 526.

[4] 4 N. B. R. 597; s. c. 8 Phila. 172.

Upon setting aside the assignment under the State law in bankruptcy, the assignee will be allowed his disbursements, and for his own services and those of his counsel. Macdonald v. Moore, 1 Abb. N. Cas. 53; Wald v. Wehl, 18 Blatch. 495.

But the assignee will be allowed no compensation for his own services unless the court can see clearly that the estate will not be subjected to a duplication of charges. Re Kurth, 17 N. B. R. 573.

As to compensation and attorney's fees, the voluntary assignee is not entitled

lowance to be made to the voluntary assignee for his necessary and reasonable charges and expenses; but it was said that no allowance could be made of a future settlement of the trustee's account in the court of a State under its laws relating to assignments.

But where the debtors had made an assignment under the laws of the State of Maine, and were within a month thereafter adjudged bankrupt, and the voluntary assignee surrendered to the assignee in bankruptcy all the property of the debtors which had come into his hands, reserving only enough to cover the expenses and commissions to which he was entitled under the State law, it was held, in a proceeding to compel him to pay over the balance, that he was not entitled to the deductions claimed, for the reason that the proceedings under the State law were in fraud of the bankrupt act, and that the bankrupt court would not allow the expenses incurred in an attempt to defeat the operation of the act.[1] It is usual and proper when the assignment is set aside for the decree to contain a direction for a reconveyance by the trustees to the assignee in bankruptcy.[2]

§ 59. *Bar to Discharge.*—Previous to the recent amendment[3] to the bankrupt act, the authorities were in conflict as to whether the execution of an assignment for the equal benefit of all creditors, was a bar to the debtor's discharge in

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to priority of payment, but as to such items stands in the same position as other creditors, and must prove his claim. Re Lains, 16 N. B. R. 168.

As to the allowance of expenses to a creditor who brings suit, see Re Dumahaut, 17 N. B. R. 517; affirmed by Waite, C. J., 15 Blatch. 20; see also Re Dumahaut, 19 N. B. R. 393.

[1] In re Stubbs, 4 N. B. R. 376; see Clark v. Marx, 6 Ben. 275.

[2] Burkholder v. Stump, *supra.*

[3] Act of July 26, 1876, c. 234; 19 Stat. L. 102; Supp. to R. S. vol. I, 232 (see *ante*, p. 65). "This amendment alters the law only in involuntary cases, and in them only in the single particular that such an assignment (*i. e.*, one in good faith, without preferences, and valid by State law), of itself, is no longer a bar to a discharge. In voluntary cases it is a bar, and in all cases it is an act of bankruptcy, and is void as against the assignee." Re Beisenthal, 15 N. B. R. 228, per Johnson, J.

case of a subsequent adjudication of bankruptcy.[1] And the question may be still regarded as being open in a case where voluntary proceedings in bankruptcy are instituted. Where, however, the debtors are adjudicated bankrupt in a proceeding of involuntary bankruptcy, no voluntary assignment for the benefit of all creditors ratably and without preference, and valid according to the laws of the State where made, will be a bar to a discharge, and this applies to assignments heretofore or hereafter made.

§ 59*a*. *Compositions in Bankruptcy and General Assignments.*—Under the provisions for composition[2] in the Bankrupt Act, creditors may resolve that a composition proposed by the debtor shall be accepted in satisfaction of their claims. It has been decided that the making of an assignment prior to the commencement of proceedings in bankruptcy does not preclude the confirmation of the composition;[3] nor where a debtor has made a general assignment in good faith are the rights of the assignee to the property affected by the subsequent bankruptcy of the debtor and his discharge under a composition in bankruptcy.[4] The creditors' right to an accounting by the assignee under a general assignment is not divested by the mere fact of a composition in bankruptcy, unless this right is relinquished by the creditors;[5] nor will an order of the bankruptcy court, made in composition proceedings to which the assignee is not a party, directing him

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[1] An assignment was regarded as a bar to a discharge in the cases of In re Goldschmidt, 3 N. B. R. 165; s. c. 3 Ben. 379; In re Brodhead, 2 N. B. R. 278; s. c. 3 Ben. 106; but the contrary doctrine was sustained in In re Pierce & Holbrook, 3 N. B. R. 258; s. c. 16 Pitts. L. J. 204; In re John M. Quackenboss, 1 N. Y. Leg. Obs. 146; Smith v. Ely, 1 Id. 343.

Where an assignment was made for the purpose of preventing some portion of the firm assets from being distributed to satisfy firm debts, it was held that the court would not grant a discharge. Re Croft, 8 Bissell, 188.

[2] Act of June 22, 1874, c. 390, sec. 17; 18 Stat. L. 178; adding to R. S. § 5103.

[3] Pool v. McDonald, 15 N. B. R. 560.

[4] Bigler v. National Bank, 26 Hun, 520; Matter of Stowell, Id. 258; see Matter of Backer, 2 Abb. N. C. 379.

[5] Matter of Allen, 24 Hun, 408; Matter of Herman, 53 How. Pr. 377; see Re Dumahaut, 15 Blatch. 20; affi'g 17 N. B. R. 517; 19 Id. 393.

to hand over the assigned property to the assignor, protect the assignee from the necessity of an accounting on the petition of a creditor who did not personally assent to the composition, although his name was duly entered on the list of creditors.[1]

[1] Matter of Stowell, 26 Hun, 258.

CHAPTER IV.

WHO MAY MAKE AN ASSIGNMENT.

§ 60. Assignments for the benefit of creditors are most commonly made by persons engaged in business, as merchants, traders, manufacturers, mechanics, and the like, either individually or as *copartners*. Any person, however, of sound mind, and not laboring under legal disability,[1] may make such a disposition of his or her property. The power of corporations to assign their property for the benefit of creditors has frequently been discussed, and important restrictions have in some instances been imposed upon the exercise of this right by corporate bodies. The authority of partners to make such disposition of the partnership effects has likewise given rise to judicial discussion and legislative enactment. The questions thus presented will be considered in the course of the present chapter. But, before entering upon this division of the subject, it will be proper to devote some attention to the meaning of a term which is constantly used, not only as descriptive of that condition of affairs in which assignments usually originate, but as a test of the validity of the instruments themselves, namely, *insolvency*.

§ 61. *Insolvency, when important.*—As we have already

[1] It was held, in the case of Fox v. Heath (21 How. Pr. 384), that an assignment executed by partners, one of whom was an infant, was void for the reason that the instrument being voidable by the infant, the conveyance was not absolute and irrevocable, and was consequently fraudulent as to creditors. In the late case of Yates v. Lyon (61 N. Y. 344), this doctrine was disapproved, and it was there held that the defense of infancy must be made, if at all, by the infant himself; and it seems that the most he could claim would be that he should not be held personally for debts beyond what the assets of the firm are able to pay.

In Soper v. Fry (37 Mich. 237), it is held that an infant's assignment is not void, but only voidable, and that only by the infant, or some one in his right. In Maryland a married woman may make an assignment of her property, the same as any other person. Schumann v. Peddicord, 50 Md. 560.

seen, many of the State statutes, which have been enacted for the purpose of restraining the right of making assignments and regulating their operation, are confined by their terms to assignments made by debtors who are insolvent or acting in contemplation of insolvency.[1] When, therèfore, the attempt is made to bring an assignment within the operation of these acts, either for the purpose of having it declared fraudulent and void, or for the purpose of compelling an administration of the assigned property in accordance with its provisions,[2] it becomes essential to establish primarily the fact that the instrument was made by a debtor in insolvency or in view of insolvency;[3] and when the deed purports on its face to be made by a solvent debtor, proof may be given of his insolvency, and if that is established, it will then be governed by the same principles as if the insolvency appeared on its face.[4]

The question of insolvency also frequently becomes of importance in considering the validity of assignments executed by corporations, the restrictions upon their right to make such conveyances depending in some instances upon their financial condition and outlook at the time of the execution of the instrument.[5]

Independent of statutory regulations, it has been thought that the right to make an assignment for the benefit of creditors belonged exclusively to debtors who were insolvent, or who honestly believed themselves to be so, and that the execution of such an instrument by a solvent debtor was conclusive evidence of an intent to hinder, delay and defraud creditors.[6] This doctrine no longer prevails to the same ex-

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[1] See *ante*, Chapter II.

[2] Hampton v. Morris, 2 Metc. (Ky.) 336.

[3] Morgentham v. Harris, 12 Cal. 245.

[4] Hardy v. Skinner, 9 Ind. 191; Hardy v. Simpson, 13 Ind. 132; Green v. Banks, 24 Tex. 508.

[5] See *post*, § 65.

[6] "Where a man," it was said in the case of Planck v. Schermerhorn (3 Barb. Ch. 344), "has ample means to pay all his debts in cash, as they become due, there seems to be no reason for making a general assignment and giving preferences, except for the purpose of delaying the creditors in the assertion of their legal rights." See Van Nest v. Yoe, 1 Sandf. Ch. 4, 9; Kellogg v. Slawson, 15

tent.[1] "The solvency of the debtor," says Mr. Justice Comstock in the case of Ogden v. Peters,[2] "in his own estimation or in fact, does not invalidate his assignment of all or any portion of his property for the payment of his debts." The solvency of the debtor, taken in connection with other suspicious circumstances, may be evidence of a fraudulent intent of the debtor to delay and defraud creditors, which will invalidate the assignment.[3]

§ 62. *Insolvency, what.*—Insolvency literally imports *inability to pay;* but the term cannot be adequately defined without reference to the two important circumstances of *manner* and *time.*

Absolute insolvency may be described as that condition of a debtor's affairs in which the whole mass of his means, including property of every description, falls short of satisfying his existing engagements, and cannot, by any possibility, or in any event, be made adequate to their entire liquidation. There can be no question as to the competency of a debtor so circumstanced to make a general assignment of his prop-

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Barb. 56; Mason, J., in Rathbun v. Platner, 18 Id. 272, 275. "Some of the cases have decided that where a debtor was perfectly solvent, having funds immediately available for the satisfaction of his debts, and knew that he was so, an assignment of all his property to pay his debts must necessarily be to delay his creditors in the collection of their debts, and must be designed for his own advantage, and was therefore void under the statute." Strong, J., in Ogden v. Peters, 15 Barb. 560, 568; disapproved in s. c. 21 N. Y. 23; and see the observations of Roosevelt, J., in Ely v. Cook, 18 Id. 612, 614; see London v. Parsley, 7 Jones L. (N. C.) 318.

[1] Ogden v. Peters, 21 N. Y. 23; Angell v. Rosenbury, 12 Mich. 241; but see Bates v. Ableman, 13 Wis. 644.

[2] 21 N. Y. 23.

[3] Baldwin v. Buckland, 11 Mich. 389; and see Northrup v. Livermore, 44 N. Y. 109, where Mr. Justice Leonard said: "Where the assets are clearly in excess of the liabilities of the debtor to a large extent, it may raise a presumption of an intent to hinder and delay creditors in the collection of their just demands, and amount to a *prima facie* case of fraud."

In Holmberg v. Dean (21 Kans. 73), it is said: "The law does not permit a debtor who, believing himself fully solvent, and actually having resources sufficient, either of cash or of property, to satisfy all his creditors in full, to assign his property, and thereby withdraw it from attachments and executions of creditors, with the motive to obtain a compromise, or to procure an extension of time, so as to save a larger surplus to himself." Seibert v. Thompson, 8 Kans. 65; Gardner v. Commercial Nat. Bank, 95 Ill. 298; First Nat. Bank v. Hughes, 10 Mo. App. 7.

erty, or as to the validity of the transfer itself, in this particular.

On the other hand, where a debtor is able to meet all his engagements as they become due, in the ordinary way, that is, to satisfy them in money or its equivalent, without resorting to the general mass of his property, or disturbing the course of his business, he is clearly solvent. But between these two conditions of absolute and irreparable insolvency at one extreme, and perfect ability to pay at the other, there is an extensive middle ground, representing that condition of a debtor's affairs which—in itself of various shades and degrees of difficulty—is described by a corresponding variety of expressions in daily use; such as "involved," and "embarrassed circumstances," "declining" and "failing circumstances." How far the conditions thus described amount to insolvency now remains to be considered.

Insolvency has been defined, "inability to pay one's debts out of one's own means,"[1] and "inadequacy of a man's funds to the payment of his debts."[2] Other definitions are given in the books,[3] but these describe insolvency in the primary and ordinary sense of the term,[4] and are the only definitions which are important to be considered under the present head.

Insolvency, then, is the inadequacy of a debtor's means, that is, of his whole means or resources (including not only money or its equivalent, but property in its most extensive sense), for the payment of all his debts.[5] Debts are paid

[1] Cowen, J., in Herrick v. Borst, 4 Hill (N. Y.), 650, 652; Paige, J., in Curtis v. Leavitt, 15 N. Y. 200.

[2] 2 Bell's Com. 162, cited by Brown, J., in Curtis v. Leavitt, 15 N. Y. 141.

[3] Bayly v. Schofield, 1 M. & S. 338; Shone v. Lucas, 3 D. & R. 218, cited by Cowen, J., in Herrick v. Borst, 4 Hill, 653; De Tastet v. Le Tavernier, 1 Keen, 161, 171; Ingraham on Insolvency (ed. 1827), 9; Brown, J., in Curtis v. Leavitt, 15 N. Y. 141; Paige, J., Id. 201.

[4] Cowen, J., in Herrick v. Borst, 4 Hill, 652.

[5] Gardner, J., in Leitch v. Hollister, 4 N. Y. 215. "The term insolvency," said Mr. Justice Field, in Toof v. Martin (13 Wall. 40), "is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and mer-

with property,[1] and so long as a debtor is in possession of means of *any* kind with which, or out of which, he can himself at once discharge all his liabilities in full, or out of which his creditors can collect all their debts by legal process, it is hardly necessary to say he cannot be considered insolvent in the sense now under consideration.[2] However deficient in cash resources, if he can, without any doubt, satisfy all his creditors in full, either by directly distributing his property among them, or by converting it into money for the purpose of payment, though (it may be) for less than its real value, and even with the result of absorbing all his means, he is not insolvent to that degree which would justify the making of an assignment.[3]

§ 63. In addition to the circumstance of the *mode* of payment (including the character of the means employed by the

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chants are said to be insolvent; and as applied to them, it is the sense intended by the act of Congress."

The latter is the sense in which the term is used in the bankrupt act. See In re Randall & Sunderland, 3 N. B. R. 18; Bump's Bankruptcy (8th ed.), 897, 793 *et seq.*, and cases cited.

The term has been construed variously in its application to debtors making assignments. Thus, in the case of McArthur v. Chase (13 Gratt. 683), Mr. Justice Daniel, in discussing the construction of the term insolvency, as employed in the statutes prohibiting preferences by limited partnerships when insolvent, remarks: "To declare that open and notorious bankruptcy is the true and only test of insolvency, would defeat in most cases the design of the law, inasmuch as the desire of the firm in failing circumstances to sustain itself, as also to prefer its special friends, would generally result in sales and assignments of most of its property, made to insure those ends, before such bankruptcy would occur. To say, on the other hand, that the firm should be held to be insolvent whenever from any cause it may fail to meet its engagements in the usual course of business, would seem to be harsh, and might tend greatly to discourage the formation of such partnerships." And he applied as a test the question whether the partnership property at the time of the assignment was sufficient to pay its debts.

But in the case of Blow v. Gage (44 Ill. 208), where the solvency of the debtors was relied upon as a badge of fraud, the fact that the debtor firm, if wound up, would be unable to pay all its liabilities, was not regarded as evidence of insolvency.

In Wheelock v. Kost (77 Id. 296), it is held that to prove the insolvency of a banking corporation, no better evidence need be produced than a return of *nulla bona* to executions.

[1] Cowen, J., in Herrick v. Borst, 4 Hill, 652.

[2] Id. ibid. Under the provisions of the Civil Code of California relating to voluntary assignments, a debtor is insolvent when he is unable to pay his debts from his own means as they become due. Title 8, part II, p. 54, § 3450.

[3] McArthur v. Chase, 13 Gratt. 683; see Rokenbaugh v. Hubbell, 5 Law Rep. (N. S.) 95, 96; cited by Strong, J., in Ogden v. Peters, 15 Barb. 563, 564; and see Shackelford v. P. & M. Bank of Mobile, 22 Ala. 238, 242, arg.

debtor), that of the *time* of payment constitutes an important element in the idea and definition of insolvency. In strictness, the term imports *present* inability to pay; it is descriptive of a present, not a future condition of affairs. It is true that present inability to pay, though a clear matter of fact, may be consistent with ability to pay at a future day. Owing to peculiar circumstances, the debtor's assets, though in ordinary times ample, may prove unavailable, because inconvertible into money. Indulgence in point of time, on the part of creditors, may enable the debtor to satisfy all his engagements in full; and the prospect of such a result, in such a case, may be morally certain. But, according to a writer of high authority,[1] whose definition of insolvency has been adopted by the courts,[2] "a person in this state is truly insolvent; and it does not follow that he is not insolvent, because in the end his affairs may come round, and he may ultimately have a surplus on winding them up."[3]

In what has just been said, the present inadequacy of the debtor's means to satisfy his engagements has been assumed as a known fact, even in connection with the probable fact of ultimate solvency. But it may happen that this fundamental fact, instead of being apparent, is itself a matter of uncertainty, being dependent upon contingencies of various kinds which cannot be foreseen or estimated. This state of things frequently occurs in the affairs of embarrassed debtors; and it is a condition which justifies, equally with the one last mentioned, the course of making a general assignment. "Where the property of the debtor," it has been said, "is of a doubtful character, and may or not, according to circumstances, be sufficient to discharge his debts in full, and his primary object and influencing motive is to distribute it equitably and fairly, an assignment, in such case,

[1] 2 Bell's Com. 162.

[2] Cowen, J., in Herrick v. Borst, 4 Hill, 652; Brown, J., in Curtis v. Leavitt, 15 N. Y. (1 Smith), 141; Paige, J., Id. 201.

[3] Blow v. Gage, 44 Ill. 208; Savery v. Spaulding, 8 Iowa, 239; Baldwin v. Buckland, 11 Mich. 389.

instead of violating the policy of the law or the rights of creditors, would be in harmony with both."[1] The possibility even of a surplus resulting in such a case to the debtor himself, would form no objection to such an arrangement.

It seems reasonable, therefore, to distinguish between mere *supposition* or even belief, on the part of a debtor, at the time of making an assignment, that he is solvent, and actual *knowledge* of that fact.[2]

A mere supposition on the part of a debtor, at the time of making an assignment to secure preferred creditors, that he is solvent, is not necessarily a badge of fraud; and an assignment will not be rendered invalid by proof of the mere supposition or belief of the debtor, at the time of making it, that he was solvent, when, in fact, he had not sufficient property to pay his debts.[3]

§ 64. *Corporation — Right to Assign.* — "A corporate body, as well as a private individual," observes Chancellor Kent in his Commentaries, "when in failing circumstances and unable to redeem its paper, may, without any statute provision, and upon general principles of equity, assign its property to a trustee, in trust to collect its debts, and pay debts and distribute as directed. It has unlimited power over its property to pay its debts."[4] "It appears to be settled," remarked Chancellor Walworth in a case before him,[5] "by a weight of authority which is irresistible, that a corporation has the right to make an assignment in trust for its creditors; and may exercise that right to the same extent and in the same manner as a natural person, unless restricted

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[1] Roosevelt, J., in Ely v. Cook, 18 Barb. 612, 614. See, also, the observations of Strong, J., in Ogden v. Peters, 15 Barb. 564, 565.

[2] Kellogg v. Slawson, 15 Barb. 56 (Onondaga General Term, October 4, 1852). This was decided on the authority of Van Nest v. Yoe (1 Sandf. Ch. 4), in which it was further said that if the assignor was, in truth, insolvent at the time, it would make no difference as to the conclusion.

[3] Morgentham v. Harris, 12 Cal. 245; Quinnebaug Bank v. Brewster, 30 Conn. 539; but see Bates v. Ableman, 13 Wis. 644.

[4] 2 Kent's Com. (10th ed.) p. 398 and note.

[5] De Ruyter v. The Trustees of St. Peter's Church, 3 Barb. Ch. 119, 124; affi'd on appeal, 3 N. Y. 238.

by its charter or some statutory provision."[1] A corporation may consequently make an assignment with preferences to particular creditors where such transfers are permitted.[2] It has been objected to the power of a corporation to make such an assignment, that, on the happening of its insolvency, the corporation and its agents became trustees for the creditors, who were entitled to a ratable payment out of the trust fund in proportion to the amount of their debts.[3] This position, however, has not been sustained, and apart from statutory provisions, no distinction exists between an individual and a corporation in regard to the exercise of the power of conferring preferences.[4]

It has also been contended, and in some instances successfully, that a general assignment of corporate property, since it practically works a dissolution of the corporation, is an act outside of the corporate powers of the officers of the company.[5] The better opinion, and the one sustained by authority, however, is that an assignment of all the corporate property does not affect the corporate franchises, and does not dissolve the corporation.[6]

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[1] See Catlin v. The Eagle Bank of New Haven, 6 Conn. 233; Pope v. Brandon, 2 Stew. (Ala.) 401; State v. Bank of Maryland, 6 Gill & J. 205; Union Bank of Tenn. v. Ellicott, Id. 363; Warner v. Mower, 11 Vt. 385; Flint v. The Clinton Co. 12 N. H. 431; Buell v. Buckingham, 16 Iowa, 285; McCallie v. Walton, 37 Ga. 611; Dobbin v. Walton, Id. 614; Rengo v. Real Estate Bank, 13 Ark. 563; Dana v. The Bank of U. S. 5 Watts & Serg. 223; United States v. Bank of U. S. 8 Rob. (La.) 262; Ex parte Conway, 4 Ark. 304; Hopkins v. Gallatin Co. 4 Humph. (Tenn.) 403; Bank of U. S. v. Huth, 4 B. Mon. 423, 429; Robins v. Embry, 1 S. & M. Ch. 207; Montgomery v. Commercial Bank of Rodney, Id. 632, 644; Arthur v. Commercial Bank of Vicksburg, 9 Id. 394; Ingraham v. Grig, 13 Id. 22; Town v. Bank of River Raisin, 2 Doug. (Mich.) 520; but see Coners v. Bank of Brest, Harr. (Mich.) 106; Haxum v. Bishop, 3 Wend. 13; Hill v. Reed, 16 Barb. 280; Ang. & A. on Corp. (10th ed.) § 191; Bun's Ex'r v. MacDonald, 3 Gratt. 215; Hurlbut v. Carter, 21 Barb. 221; Shultz v. Sutter, 3 Mo. App. 137; Lionberger v. Broadway Savings Bank, 10 Id. 499; Covert v. Rogers, 38 Mich. 363.

[2] Ringo v. Real Estate Bank, 13 Ark. 563; Dana v. Bank of U. S. 5 Watts & Serg. 223; State v. Bank of Maryland, 6 Gill & J. 205; Union Bank of Tenn. v. Ellicott, 6 Id. 363.

[3] Catlin v. Eagle Bank of New Haven, 6 Conn. 233. [4] Ib. 242.

[5] Smith v. N. Y. Consolidated Stage Co. 18 Abb. Pr. 419; see Abbot v. Am. Hard Rubber Co. 33 Barb. 578; Com'rs v. Bank of Brest, Har. Ch. (Mich.) 106; see argument in Buell v. Buckingham, 16 Iowa, 284; Mr. Justice Story dissenting in Beaston v. Farmers' Bank of Del. 12 Pet. 138.

[6] State v. Bank of Maryland, 6 Gill & J. 205; Union Bank of Tenn. v. Ellicott, Id. 363; Hurlbut v. Carter, 21 Barb. 221, 224; Ringo v. Real Estate Bank, 13

The right of assignment is not affected by a provision in the charter that the stockholders shall be individually liable for the corporate debts.[1] The power may be exercised by a quorum of a board of directors of a corporation at a meeting at which a bare quorum is present.[2]

§ 65. *Restrictions on the Right.*—In some cases, the general power of alienation is restrained either by the particular act creating the corporation, or by general statute. In New York, it was provided by the sixth section of the "Act to prevent fraudulent bankruptcies by incorporated companies," &c.,[3] that whenever any incorporated company should have refused the payment of any of its notes, or other evidences of debt, in specie or lawful money of the United States, it should not be lawful for such company, or any of its officers, to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it should not be lawful to make any transfer or assignment in contemplation of the insolvency of such company to any person or persons whatever; and every such transfer and assignment to such officer, stockholder, or other person, or in trust for them or their benefit, was declared to be utterly void. The assignment in Haxtun v. Bishop[4] was assailed as being void under this statute. But the Supreme Court held that, as it was not an assignment "to any officer or stockholder for the payment of any debt" of theirs, nor

Ark. 563; Ohio Life and Trust Co. v. Merchants' Ins. & Trust Co. 11 Humph. 1; Craig's Appeal, 92 Penn. St. 396; Ahl v. Rhoads, 84 Id. 319; Shryock v. Bashore, 82 Id. 159; Ang. & A. on Corp. § 191; Southern L. Rev. vol. III, N. S. 553; see *post*, Chap. XXII.

[1] Pope v. Brandon, 2 Stew. 401.

[2] Buell v. Buckingham, 16 Iowa, 284. In Milliken v. Steiner, 56 Ga. 251, it was held that the president and cashier of a bank were the proper officers to execute an assignment; and in Assignment of the Union Banking Co. 12 Phila. 469, that the stockholders of a bank have the right to select an assignee subject to the approval of the court and having done so, a receiver appointed by the court, pending litigation, will be ordered to pay over to the assignees when duly qualified.

[3] Passed April 21, 1825; Session Laws of 1825, pp. 448, 450; 2 R. S. (7th ed.) p. 1534.

[4] 3 Wend. 13.

an assignment to any one "in contemplation of insolvency," within the purview of the act, it was valid. And it was remarked by Savage, C. J., who delivered the opinion of the court,[1] that the legislature did not, by the act, intend to prohibit assignments by corporations in all cases, but only in the two instances designated: one, before insolvency and in anticipation or contemplation of that event; the other, after insolvency, to officers or stockholders for the payment of any debt.[2]

The provision of the act above refetred to was incorporated without change into the fourth title of the eighteenth chapter of the first part of the Revised Statutes of this State;[3] it being declared, however, that the provisions of that title should not apply to any incorporated library or religious society, nor to any *moneyed* corporation which shall have been or shall be created, or whose charter shall be renewed or extended, *after the first day of January*, 1828; which were declared to be subject to the provisions of the second title of the same chapter.[4]

In the case of Bowen v. Lease,[5] which came before the Supreme Court of this State, in 1843, it was held that this provision applied to the New York and Erie Railroad Company, notwithstanding the language of the 18th section of the act incorporating that company,[6] in which special reference was made to the third title of the eighteenth chapter of the first part of the Revised Statutes, without any allusion to the fourth title; and that an assignment by such company of any of its property, in contemplation of insolvency, was void.[7]

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[1] 8 Wend. 17.

[2] But see Harris v. Thompson, 15 Barb. 62, 65, 66. As to the signification of the term *insolvency*, see Gillet v. Moody, 3 N. Y. 479; Herrick v. Borst, 4 Hill, 650; Oakley v. Paterson Bank, 1 Green's Ch. (N. J.) 173, 176, 177; Mitchell v. Gazzam, 12 Ohio (Stanton), 315; Read, J., Id. 336; Parker v. Gossage, 2 Cr., M. & R. 617; Cutten v. Sanger, 2 Y. & J. 459.

[3] 2 Rev. Stat. (7th ed.) p. 1534.

[4] Id. § 11, p. 1536.

[5] 5 Hill, 221.

[6] Laws of 1832, p. 408.

[7] See the opinion of Chief Justice Nelson in this case, in which the object and operation of the several titles of the eighteenth chapter of the first part of the

In the case of Harris v. Thompson,[1] which came before the Supreme Court of this State, in 1853, the court, in construing the language of the fourth section of the fourth title of the Revised Statutes, re-enacting the provision of the act of 1825, already referred to, held that the second clause of that section, which declares it to be unlawful "to make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever," was not, like the first clause, confined in its application to assignments by incorporated companies who had "refused the payment of any of their notes or other evidences of debt in specie or lawful money of the United States," but applied to all assignments and transfers by corporations, in contemplation of insolvency, to any person or persons whatever. And they accordingly held that an assignment by a manufacturing company, of all its property to a trustee, in trust for the payment of its creditors ratably, made in contemplation of insolvency, was absolutely void by statute. And this position has since been approved by the Court of Appeals in this State.[2] In Missouri it is held that an insurance company cannot, even with the consent of stockholders, make a valid voluntary assignment, and thus withdraw itself and its property from the control of the Insurance Department of the State, after it has violated the laws made for the regulation of insurance companies. Such an assignment would be in fraud of those laws.[3]

§ 66. *Moneyed Corporations.*—Another special restriction[4] imposed on the right of corporations to make assign-

Revised Statutes are explained, and the rules of their construction laid down. 5 Hill, 223–227.

[1] 15 Barb. 62, Oneida General Term, January 3, 1853. In New Jersey it has been held that, under the second section of the act relating to insolvent corporations, assignments for the benefit of creditors, executed by insolvent companies, are invalid. Am. Ice Machine Co. v. Paterson Steam Fire Engine and Machine Co. 22 N. J. Eq. 72.

[2] Sibell v. Remsen, 33 N. Y. 95; Robinson v. Bank of Attica, 21 N. Y. 406; Loring v. U. S. Vulcanized Gutta Percha Co. 36 Barb. 329.

[3] Relfe v. Commercial Ins. Co. 5 Mo. App. 173.

[4] As to restrictions on the right of corporations to give preferences, see *post*, Chap. X.

ments, in the State of New York, is contained in that provision of the Revised Statutes which, under the general head of regulations to prevent the insolvency of moneyed corporations, declares that "No conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation, of any of its real estate, or of any of its effects, exceeding the value of one thousand dollars."[1] But it is further declared that "this section shall not apply to the issuing of promissory notes or other evidences of debt, by the officers of the company, in the transaction of its ordinary business; nor to payments in specie or other current money, or in bank bills, made by such officers; nor shall it be construed to render void any conveyance, assignment, or transfer, in the hands of a purchaser for a valuable consideration and without notice."[2] In the important case of Curtis v. Leavitt,[3] in the Court of Appeals, the construction of this section of the statute was made the subject of much discussion. It was held by three of the judges who delivered opinions,[4] that the language of the statute must be strictly pursued, and that there must actually be a formal resolution of the board of directors, adopted previous to the transfer and expressly authorizing it. It was maintained on the other hand, by two of the judges,[5] that it was sufficient if the requisition of the statute be substantially complied with, that the transfer might be approved at the time or ratified afterwards, and that the ratification need not be declared in express terms. The conclusion finally arrived at by the court seems to have been that the transfers in the case before the court were void, as not being authorized by a previous resolution; but that the purchasers and pledgees of the company's bonds secured by such transfers, were "purchasers for a valuable

[1] 2 Rev. Stat. (7th ed.) p. 1366, § 8; see Hoyt v. Thompson, 1 Seld. 320.
[2] 2 Rev. Stat. *ubi supra*.
[3] 15 N. Y. 9.
[4] Shankland, J., Id. 174; Paige, J., Id. 189, 190; Selden, J., Id. 249, 250.
[5] Comstock, J., 15 N. Y. 47–50; Brown, J., Id. 134–138.

consideration and without notice," and therefore within the saving clause of the eighth section already cited.[1]

It was further held in the case just cited, in accordance with previous decisions in this State, that *banking associations* organized under the general banking law of 1838,[2] are *corporations*, and therefore within the provisions of the Revised Statutes relating to moneyed corporations.[3]

§ 67. *Power of Partners to Assign.*—In cases of copartnership, an assignment for the benefit of creditors may be made in the name of the firm by a single partner, by the authority or with the consent of his copartners, with the same effect as if made by all.[4] But to what extent one partner may bind the firm by an assignment of the partnership property, in the name of the firm, *without the knowledge or consent* of his copartners, does not seem to be

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[1] See 15 N. Y. 11, reporter's abstract. Compare the case in the court below, 17 Barb. 309; and see Gillet v. Phillips, 18 N. Y. 114.

[2] See this act, with all the amendments noted, and other convenient references, in Cleveland on the Banking System of the State of New York, Appendix, pp. 211–228.

[3] Comstock, J., 15 N. Y. 47; Brown, J., Id. 133; Shankland, J., Id. 171; Paige, J., Id. 183, 184. This has been a vexed question in the courts of this State. Cases may be found in the reports, in which it has been held that associations organized under the general banking law are *not* corporations. Warner v. Beers and Bolander v. Stevens, in the Court of Errors, 23 Wend. 103; see Gillett v. Campbell, in the Supreme Court, 1 Den. 520. But the contrary may now be considered as settled by the express decisions of the Court of Errors and the Court of Appeals. Supervisors of Niagara v. The People, 7 Hill, 504; Gillet v. Moody, 3 N. Y. 479; Talmage v. Pell, 7 N. Y. 328; Leavitt v. Blatchford, 5 Barb. 9, and cases there cited; s. c. on appeal, 17 N. Y. 521; Robinson v. The Bank of Attica, 21 N. Y. 406; The Bowery Bank Case, 5 Abb. Pr. 415; s. c. 16 How. Pr. 56; and see Matter of Empire City Bank, 10 How. Pr. 498. In the case of Gillet v. Moody, Bronson, C. J., in delivering the opinion of the court, observed: "That these associations are corporations and moneyed corporations, has been directly and expressly adjudged by the highest courts in the State. They are not corporations in a qualified sense, as *within the intent and meaning of some particular statute;* but are corporations to all intents and purposes. If anything can be settled by judicial decisions, this is settled." 3 N. Y. 485. The adjudged cases on this point may be found fully collected and conveniently digested in the appendix to Cleveland on the Banking System of the State of New York, pp. 297–325. It will be seen on reference to the case of Curtis v. Leavitt, already cited, that several of the judges who delivered opinions, while admitting the question to be settled by authority, distinctly intimate that, if it were *res integra*, their opinions would be given on the other side. Comstock, J., 15 N. Y. 47; Shankland, J., Id. 171; Paige, J., Id. 183, 188.

[4] Baldwin v. Tynes, 19 Abb. Pr. 32; Weiles v. March, 30 N. Y. 344; Ely v. Hair, 16 B. Mon. 230.

settled. It is clear that he may so assign *portions* of the partnership effects, in payment of partnership debts, or by way of security for antecedent debts, or debts thereafter to be contracted on account of the firm.[1] And in this way he may give a preference to one creditor or to several.[2] Assignments of this description are frequently made in the course of trade, for the purpose of sustaining the credit of a firm, or with a view to the continuance of the partnership.[3] So a single partner may sell[4] or mortgage[5] all the partnership effects—his power to bind the firm to the extent being an implied power, arising out of the nature of the partnership relation.[6] But whether one partner or any number less than all the partners, may, without the knowledge or consent of his copartners, make a general assignment of all the funds and effects of the partnership, especially in trust for the benefit of creditors, has been doubted;[7] and the question, as a general one in American law, is not yet conclusively settled.

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[1] Harrison v. Sterry, 5 Cranch, 589; Anderson v. Tompkins, 1 Brock. 456; Parker, C. J., in Hodges v. Harris, 6 Pick. 360, 361, 362; Tapley v. Butterfield, 1 Metc. 515, 518; Walworth, C., in Havens v. Hussey, 5 Paige, 30, 31; Farnsworth, C., in Kirby v. Ingersoll, 1 Harr. (Mich.) 172, 187, 191; Hoffman, A.V.C., in Hitchcock v. St. John, Hoff. Ch. 511; Story on Partn. § 101; Collyer on Partn. § 395 (Perkins' ed. 1848). In Fox v. Hanbury (Cowp. 445), Lord Mansfield decided that even after an act of bankruptcy committed by one partner, an assignment *bona fide* of partnership effects, by the solvent partner, to a creditor of the firm, in payment of his debt, was binding on the firm. In Hodges v. Harris (6 Pick. 360), it was held that one partner may assign goods at sea to pay a partnership debt. In Mills v. Barber (4 Day, 428), the assignment of a debt due the firm, made by a single partner without the knowledge of his copartner, was held valid. In Everit v. Strong (7 Hill [N. Y.], 485), it was held to be no objection to an assignment of an account due to several partners, that it was made by only one of them. See 5 Hill, 163. The power of one partner to *sell* the partnership effects, without the knowledge or consent of his copartners, in payment of debts, is well settled. Lamb v. Durant, 12 Mass. 54; Anderson v. Tompkins, 1 Brock. 456; Forkner v. Stuart, 6 Gratt. 197; McClelland v. Remsen, 3 Abb. Dec. (N.Y.) 74; Mowson v. Mendenhall, 18 Minn. 232; Young v. Keighley, 15 Ves. 557.

[2] Story on Partn. § 101.

[3] Harrison v. Sterry, 5 Cranch, 289.

[4] Anderson v. Tompkins, 1 Brock. 456; Arnold v. Brown, 24 Pick. 89; Whitton v. Smith, 1 Freem. (Miss.) 231; Mabbett v. White, 12 N. Y. 442; Graser v. Stellwagen, 25 N. Y. 315; Collumb v. Bloodgood, 15 Ala. 34; Boswell v. Green, 1 Dutch. (N. J.) 390; see McNutt v. Strayhow, 39 Penn. 269.

[5] Tapley v. Butterfield, 1 Metc. 518.

[6] Story on Partn. § 101; 3 Kent's Com. [44, 46] 47, 49; Parsons on Partnership, 167.

[7] Story on Partn. *ubi sup.*; 3 Kent's Com. *ubi sup.*

§ 68. *Power of Partners to Assign; Review of Cases.*— The earliest reported American case in which the question appears to have arisen, is that of Dickinson v. Legare,[1] in the Court of Chancery of South Carolina. In that case an assignment of all the partnership effects had been made by an absent partner, without the knowledge or consent of his copartner, to pay the debt of a particular creditor. The court decided the assignment to be invalid, on the general ground of the want of power in one partner to assign the partnership property in this manner, without the consent of his copartner. The assignment appears to have been made directly to the creditor; but it was executed under very peculiar circumstances, which are supposed to have materially influenced the decision. The company, during the revolutionary war, were doing business in this country; and while one of the partners was on a voyage to France, he was taken by a British ship of war, and carried as a prisoner to England, where he was prevailed upon by a creditor residing there to give him a general assignment of all the partnership funds, which funds were then in this country, to secure the payment of his particular debt against the firm. It is remarked by Chancellor Walworth, in reviewing this case in Egberts v. Wood,[2] that "although the decision was put upon the general ground that one partner had not the right to assign the partnership funds in this manner without the consent of his copartner, there is no doubt that the particular circumstances under which that assignment took place had a very considerable influence in bringing the mind of the chancellor to that result. The assignment in that case being made by a citizen of one of the United States, during the existence of the war, to an alien enemy and in an enemy's country, was probably void by the laws of war, so far at least as to prevent its being carried into effect by any of the courts of this country. And certainly it could not be considered as made according to any mercantile usage." The

[1] 1 Dessaus. 537. [2] 3 Paige, 517.

decision itself was considered to have been overruled by the Court of Appeals of South Carolina, in the case of Robinson v. Crowder,[1] which will be mentioned on a succeeding page.

§ 69. In the case of Harrison v. Sterry,[2] the question as to a partner's power of assignment first came before the Supreme Court of the United States. In that case an assignment of a large amount of partnership property[3] had been made by a partner of a London house residing in New York, to a trustee, for the benefit of certain creditors, but without the knowledge or consent of the other partners. The assignment itself, which was under seal, professed to be made for the purpose of raising funds in aid and support of the credit of the firm, and with reference to a continuation of the business; and the partner making it had a power of attorney from the others, which, however, did not authorize him to execute deeds in their names generally. It was objected to the assignment that one partner was not authorized to make it, because it was not a transaction within the usual course of trade. But the court (Marshall, C. J.) were of opinion that it was such a transaction, and laid stress on the circumstances under which it was executed. "The whole commercial business of the company in the United States," it was said, "was necessarily committed to Robert Bird (the partner by whom the assignment was executed), the only partner residing in this country. He had the command of their funds in America, and could collect or transfer the debts due to them. The assignment under consideration is an act of this character, and is within the power usually exercised by a managing partner. In such a transaction he had the power to sign the names of both firms, and his act is the act of all the partners." The assignment, however, was adjudged to be void on another ground, namely, that of being a fraud on the bankrupt laws.

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[1] 4 McCord's Law, 519; see Parsons on Partnership, p. 167, n; see Kimball v. Hamilton Fire Ins. Co. 8 Bosw. (N. Y.) 495.

[2] 5 Cranch, 289.

[3] It does not appear to have been of *all*.

§ 70. In the case of Mills v. Barber,[1] in the Supreme Court of Connecticut, the assignment was not a general one, the subject of it being a debt due the company, which was assigned directly to a particular creditor (with a power to collect and apply the avails), by one of the partners, without the knowledge of his copartner. The court, in sustaining the assignment, recognized the general principle that one partner has the absolute power of disposing of all the partnership property, where the act done has relation to the joint trade or business; and that, with regard to all personal property, both in possession and in action, each partner necessarily has the same power and control over it that any individual has over his own.[2]

In the case of Pearpoint v. Graham,[3] which came before Mr. Justice Washington, in the Circuit Court of the United States for the District of Pennsylvania, the assignment was a general one, of all the partnership estate, and was executed by one of two partners to a trustee, for the benefit of such of the creditors as should, within a specified time, execute in favor of the partners a full release of all demands. The executing partner resided in Philadelphia, the others in Charleston, the business being conducted in both places, under different firms. The assignment was contended to have been made without the assent of the copartner; and was objected to as invalid, on the ground that one partner could not dispose of the whole of the partnership effects, and thus by his own act dissolve the partnership, contrary to the terms of the association, without the assent of his copartners. The principle of the objection seems to have been acknowledged by the learned judge, who, in the course of delivering his opinion, remarked as follows: "It may admit of serious doubt whether one partner can, without the consent of his associates, assign the whole of the part-

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[1] 4 Day, 428.

[2] Ib. 430, Brainerd, J.

[3] 4 Wash. C. C. 232; sometimes inaccurately cited as "Pearpoint v. Lord." Usually cited as "Pierpont v. Graham."

nership effects (otherwise than in the course of the trade in which the firm is engaged), in such manner as to terminate the partnership. An assignment of all the effects to trustees for the benefit of the creditors of the concern, would seem emphatically to be of this character. Such is its obvious design, and such must be its necessary consequence."[1] The learned judge, however, thought that in the case before him the assignment had been ratified by the other partner, and so became the act of the firm; and on that ground it was sustained.

§ 71. In the case of Anderson v. Tompkins,[2] before Chief Justice Marshall, in the Circuit Court for the District of Virginia, the question of a partner's power of assignment was distinctly presented, and very fully considered by the court. In this case, an assignment had been made by one of two partners of an American firm, during the absence of the other on a voyage to England, and (as was alleged) without his knowledge or consent. It was an assignment of all the effects, personal and real, of the company (the house having stopped payment) to trustees, for the payment, first of certain creditors named in the deed, and then of those who should exhibit their claims within certain specified periods. The general doctrine as to the power of each partner of a firm to dispose of the whole of the partnership effects, was not controverted on the argument; but it was contended that it did not authorize the deed in that case, because, first, it was not an act in the course of trade, but was a disposition of the whole subject, and a dissolution of the partnership; and, secondly, because it was a preference to particular creditors, in making which the other partner ought to be consulted. The court, however (after considering these objections at length), was of opinion that the assignment, so far as it embraced the partnership effects for sale, was valid; and, on this point, Chief Justice Marshall expressed himself with peculiar confidence, as having "never,

[1] 4 Wash. C. C. 284.

[2] 1 Brock. 456.

from the first opening of the cause, entertained a moment's doubt." He could perceive no distinction between an *assignment* of all the partnership effects to pay debts, and a *sale* of all for money or on credit, which was clearly within the power of a single partner.[1] Both were regarded as acts fairly within the course of trade,[2] and the circumstance that the goods were conveyed to *trustees* to be sold, was considered not to affect the power.[3] The assignment was regarded as not necessarily dissolving the contract of partnership, though it might suspend the operations of the company.[4]

It is evident, from a perusal of this important case, that the decision of the court was placed partly on the ground of a partner's general power, and partly on that of the necessity of the case, arising from the absence of the non-executing partner; but it is difficult to ascertain which of these considerations exercised a controlling influence upon the mind of the court. Throughout his opinion, the chief justice seems to place the power to *assign* on the same footing with the power to *sell;* the latter being conceded to belong absolutely to each partner, to the extent of the *whole* effects, "though the others be *within reach.*"[5] The situation of the partners in the case before the court, is referred to as giving "increased force" to the reasoning by which the assignment was sustained as an act within the course of trade, but not as constituting the main ground of the opinion.[6] And it is only on the point of giving a *preference to creditors*, that the court expressly say that had the non-executing partner been present, "he ought to have been consulted," and that "the act ought to have been a joint act."[7] *Preference of creditors*, indeed, is evidently regarded as the most important feature of the power; *conveyance to trustees* being held to be an immaterial consideration. From these expressions, it might be inferred to have been the opinion of the court (though not

[1] 1 Brock. 460, 461.
[2] Id. ibid.
[3] Id. 461.
[4] Id. ibid.
[5] Id. 459, 461.
[6] Id. 460.
[7] Id. 462.

expressed in terms), that an assignment by one partner to trustees for the benefit of creditors, *without preferences*, would be valid, though the non-assenting partner were present, or within reach. On the other hand, there are expressions in the opinion which seem to limit even the power of *sale* by one partner, to cases where the other is absent, and make the consultation of a partner who is present, a necessary preliminary to its exercise. Thus, it is said of the power of sale, that "it would certainly not be exercised in the presence of a partner without consulting him; and if it were so exercised, slight circumstances would be sufficient to render the transaction suspicious, and perhaps to fix on it the imputation of fraud."[1] And again, "In the absence of one of the partners, in a case of admitted and urgent necessity, the power to sell may be exercised by the partner who is present, and who must act alone, in such manner as the case requires, provided it be exercised fairly."[2]

§ 72. In the case of Robinson v. Crowder,[3] in the Court of Appeals of South Carolina, the assignment was of all the partnership property to a trustee, for the benefit of all the creditors ratably, and was executed by two of three partners, who resided in Liverpool, the remaining partner residing in Charleston, South Carolina, and having the partnership effects conveyed in his possession. The court considered it to be no objection to the assignment, that it was not executed by the partner in this country; and Mr. Justice Johnson, who delivered the opinion, after referring to the case of Harrison v. Sterry, as having decided "on very sound principles," that an assignment of funds for the payment of debts was in the course of trade, went on to remark as follows: "Indeed, every partial application of funds to the payment of debts, whether it consists of cash or goods, or anything else, is, in effect, an assignment for that purpose, and binds the firm. And if, in the course of things, a general assignment becomes necessary, there can be no reason why it

[1] 1 Brock. 460. [2] Id. 468. [3] 4 McCord's Law, 519.

should not be equally binding. The principle is the same whether it be partial or total, and it follows that, in either case, one may bind the whole."[1] The decision, however, was against the assignment on other grounds.

In the case of Egberts v. Wood,[2] in the Court of Chancery of New York, an assignment of all the partnership effects had been made by one of two surviving copartners, to trustees, to pay certain preferred creditors, without the assent of the other, or of the representative of the deceased partner (though this was denied). The non-executing partner does not appear to have been absent; but it is said he was a dormant partner, and the execution of the assignment by him was for that reason not considered necessary to its validity. It was held by the chancellor to be "the better opinion that one of the partners, at any time during the existence of the partnership, may assign the partnership effects in the name of the firm, for the payment of the debts of the company, although by such assignment a preference is given to one set of creditors over another."[3] The cases of Dickinson v. Legare, Robinson v. Crowder, Pearpoint v. Graham, Mills v. Barber, and Harrison v. Sterry,[4] were reviewed, and considered as authorizing this conclusion. The chancellor declined, however, expressing any opinion "in favor of the validity of such an assignment of the partnership effects to a *trustee*, by one partner, against the known wishes of his copartner, and in fraud of his right to participate in the distribution of the partnership funds among the creditors; or in the decision of the question which of the creditors should have a preference in payment out of the effects of an insolvent concern."[5]

§ 73. In the case of Havens v. Hussey,[6] in the same court, an assignment of all the partnership property and effects had been made by one of two copartners—without

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[1] 4 McCord's Law, 537.
[2] 3 Paige, 523.
[3] 3 Paige, 525.
[4] The case of Anderson v. Tompkins was not noticed.
[5] 3 Paige, 517.
[6] 5 Paige, 30.

the consent of the other, and against the known wishes of her attorney, who was present and attending to her interests —to trustees, to pay certain preferred creditors. The point mentioned and passed over in Egberts v. Wood, without an opinion, was here distinctly presented; and it was decided that such an assignment was illegal and inequitable, and could not be sustained. The chancellor explained his conclusion in Egberts v. Wood, to have been, "that from the nature of the contract of copartnership, one of the partners, during the continuance of the partnership, might make a valid assignment of the partnership effects, or so much thereof as was necessary for that purpose, in the name of the firm, *directly* to one or more of the creditors, in payment of his or their debts, although the effect of such an assignment was to give a preference to one set of creditors over another."[1]

In the case of McCullough v. Somerville,[2] in the Court of Appeals of Virginia, the assignment was executed by one of two partners to trustees for the payment of creditors in a certain order, and included all the private property of the assignor, and all the property of the firm. It appeared that the partner executing the assignment had the whole management of the concern, the other partner residing in another State (Pennsylvania). The court (Carr, J.) thought the deed effectual to convey the absent copartner's interest, on the grounds that the whole of the partnership property was personal, that the assignor was the sole managing partner, and that the purpose for which the effects were conveyed was the payment of *bona fide* creditors. The case of Anderson v. Tompkins was considered as fully in point and as decisive of the case. "Following this high authority," observed Carr, J., "I conclude that a partner has a right to convey the social effects (save real estate) to trustees to pay specified creditors of the firm, and this without the consent of his copartner, where (as here) that copartner

[1] 5 Paige, 31.

[2] 8 Leigh, 415.

resides out of the State, and the grantor is sole manager of the concern."[1] And Cabell, J., observed, "That one partner living in this State, and having the management of all the business of the company (the other partner residing out of the State), has the power to deliver over and assign the goods and choses in action of the company to the creditors of the company, in discharge of the partnership debts, is a position too clear, in my opinion, to require either argument or authority. If he can do this directly, I think it equally clear that he may indirectly, by delivering or assigning them to an agent or trustee to be applied in payment of the partnership debts. And if he may do this as to all the creditors, he may do it as to any one or more of them; and hence he may give a preference to a particular creditor, or to a class of creditors, although the consequence of such preference may, in case of a deficiency of funds, defeat the claims of the postponed creditors."[2]

§ 74. In the case of Deckard v. Case,[3] in the Supreme Court of Pennsylvania, the assignment was of the whole stock in trade of the firm directly to certain creditors in payment of debts. It was made by one of two partners, without the assent of the other; but it appeared that the non-assenting partner had left the country. The court sustained the assignment on the general ground of the implied power of a partner to dispose of the whole partnership interest, as held in Mills v. Barber, and other cases; though the peculiar facts of the case were also urged as strengthening such a conclusion.

In the case of Hennessy v. The Western Bank,[4] in the same court, the principle maintained in Deckard v. Case was applied to the case of a general assignment of partnership effects to trustees executed by two of three copartners, the assignment being held to be binding on the third.

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[1] 8 Leigh, 415, 433. [2] Id. 436.

[3] 5 Watts, 22. Sometimes inaccurately cited as "Deckard's Case."

[4] 6 Watts & Serg. 300; Rogers, J., Id. 310.

The case of Deckert v. Filbert,[1] in the same court, involved the same general question, though under some new circumstances. In this case, two assignments had been made of all the partnership effects in trust for creditors: one by one of the partners with preferences, and the other shortly after by the other partner, without preferences. The court below was of opinion that the facts in evidence proved the express dissent of each partner to the assignment made by the other, and that therefore neither assignment had validity. On appeal to the Supreme Court the judgment was affirmed.

§ 75. In the case of Kirby v. Ingersoll,[2] in the Court of Chancery of Michigan, an assignment of all the partnership effects had been made by one partner, to a trustee, who was also a creditor, with preferences to particular creditors, without the knowledge or consent of the other, *who was present*, and without any previous consultation with him. The court not only held the assignment to be void, but went the further length of declaring that one partner could not make a general assignment of the partnership effects to a trustee, for the benefit of the creditors of the firm (even without preferences), without the knowledge or consent of his copartner, where the latter is on the spot, and *might be consulted*. The chancellor, in the course of delivering his opinion, observed that "a partner may transfer a portion of the assets or obligations, for the purpose of paying or securing debts, or to raise means to carry on the concern; but that the power of divesting entirely one partner of his interest, appointing a trustee for both, and breaking up the concern, is not one of the powers either contemplated or implied by the contract of copartnership."[3] The New York case of Havens v. Hussey was cited and relied on; and the principle upon which assignments of this kind have been declared void, was stated

[1] 8 Watts & Serg. 454.

[2] 1 Harr. (Mich.) 172; s. c. on appeal, 1 Doug. 477.

[3] 1 Harr. 187.

to be that one partner has no authority to make a general assignment of the partnership effects, in fraud of the rights of his copartner to participate in the distribution of them among the creditors.[1]

In the Missouri cases of Hughes v. Ellison,[2] Drake v. Rogers,[3] and Hook v. Stone,[4] it has also been decided that one partner has not authority to make a general assignment to a trustee for creditors.

§ 76. In the case of Hitchcock v. St. John,[5] in the Court of Chancery of New York for the first circuit, the facts were these. One of two partners resided in the city of New York, carrying on the business there; and the other in Augusta, Georgia, conducting the business there, under the same firm. The partner residing in New York made an assignment to trustees of all the partnership property of that firm, with preferences to certain creditors, without the assent of the partner in Augusta. The assignment was declared void, the court holding that one partner, on the eve of insolvency, cannot assign all the partnership property to a trustee for the purpose of paying debts of the firm *with any preferences*. The case was held to be different where the assignment was *without preferences*, the vice-chancellor observing that "the rule seems well established that this court will sustain an assignment of the whole of the partnership funds by one partner, where all the creditors are admitted to an equal participation."[6] It was further held, that although partnership funds might be exhausted by an immediate payment to a creditor, by one partner, yet there was no implied authority, arising from the partnership relation, in one partner to appoint a trustee of all the funds, to collect and distribute them as that partner shall determine. The appointment of a trustee was regarded as an extraordinary act, in which all

[1] 1 Harr. 191.
[2] 5 Mo. 463.
[3] 6 Id. 317.
[4] 34 Id. 329.
[5] Hoff. Ch. 511.
[6] Hoff. Ch. 514, 515.

the members of the firm were entitled to have a voice and share.[1]

The facts in this case resemble, to a considerable extent, those in Pearpoint v. Graham, already noticed,[2] which, however, was not cited. The effect of the *absence* of a non-assenting partner, as qualifying the rule applicable to the case, was not adverted to; the principal test adopted by the court for determining the question, being the fact whether the assignment was with or without *preferences*.

§ 77. In the case of Dana v. Lull,[3] in the Supreme Court of Vermont, the assignment was of all the partnership effects to a trustee, for the benefit of preferred creditors, and was made by one of two partners, without the authority or assent of the other. It appeared that the partners resided in different parts of the State, and that the partner who made the assignment had the superintendence and care of the business. The court held the assignment to be void, as not being within the implied power of the partner, as agent of the firm; and that such power extended only to such acts as are incidental to the carrying on of the business of the firm, and not to the appointment of a trustee to close up the business, and distribute the proceeds of the partnership effects in unequal proportions among the creditors, and thereby exclude the other partners from participating in the distribution, or in the decision of the question in regard to what creditors should have a preference, if any.[4] The cases principally relied on by the court were those of Hitchcock v. St. John, and Havens v. Hussey.

§ 78. In the case of Hayes v. Heyer,[5] in the Court of Chancery of New York, for the first circuit, the question whether one partner could make a general assignment of the partnership effects, even without preferences, where his co-partner *was present*, attending to business as usual, came

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[1] Hoff. Ch. 518.
[2] *Ante*, p. 106.
[3] 17 Vt. 390.
[4] Id. 394.
[5] 4 Sandf. Ch. 485.

up incidentally, and was noticed by the court, as being one of importance and difficulty, but was not further considered, the point not being before the court for decision. The case was subsequently transferred to the Superior Court of the city of New York, where it was decided against the validity of the assignment, as will be seen below.

§ 79. In the case of Deming v. Colt,[1] in the Superior Court of the city of New York, a general assignment had been made of all the partnership property, by one of two partners, to a trustee in trust for the benefit of the creditors of the firm, without any preferences; and it was made without the consent or assent of the other partner, and without consulting him, although he was at the time actively engaged in the business. The court held the assignment to be void, on the principle that one partner cannot, of his own exclusive authority, appoint a trustee to dispose of the partnership effects in behalf of all the copartners; and that it is not incident to the right of one partner thus to select an agent, and clothe him with all the authority of the firm, for the disposal and application of its property. The rule in this case was laid down by the court without hesitation, "that a partner can *in no case* make a general assignment to a trustee for the benefit of creditors, against the consent, or without the acquiescence of his copartner; *the latter being present*, or capable of acting in the matter."[2]

In the case of Hayes v. Heyer,[3] in the same court and reported with the last case, the same question arose under somewhat different circumstances. This was a case of an assignment made by one of the general partners in a limited partnership, with the consent of the special partner, but without the knowledge or assent of the other general partner, who was present, and might have been consulted. The assignment was a general one, of all the partnership effects, to a trustee for the benefit of all the creditors ratably. The

[1] 3 Sandf. S. C. 284. [2] Id. 292. [3] Id. 284, 293.

court adopted the views and conclusion of the court in Deming v. Colt, and declared the assignment void, holding that the power to appoint a trustee, and transfer to him the entire partnership effects, was not an implied power which one partner might exercise without the knowledge or consent of the others.[1]

§ 80. In the case of Kemp v. Carnley,[2] in the same court, an assignment had been made by one of two partners, of all the partnership property, to a trustee, giving a preference to a mortgage creditor of the firm. It appeared that the non-executing partner had absconded. The court held the assignment valid. The doctrine of Deming v. Colt and Hayes v. Heyer was recognized as the established rule of the court.

In the case of Fisher v. Murray,[3] in the New York Court of Common Pleas, it was held that to support an assignment of the whole of the partnership property to a trustee, for the payment of debts, by one partner, or any number short of the whole, even without preferences, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners; or from their acts or declarations, either before or subsequent thereto, it must appear that it was executed with their assent, or by their authority.

§ 81. In the case of Forbes v. Scannell,[4] in the District Court of California for the fourth judicial district, an assignment had been made by one of three partners doing business in Canton, China, in the absence of the others, of all the partnership property, to trustees, for the equal benefit of all the creditors. One of the absent partners was residing

[1] In the case of Everson v. Gehrman, decided at the New York General Term of the Supreme Court, February, 1855, it was held that the confession of a judgment to a particular creditor, by one of two partners, against the known wishes of his copartner, was void; the court holding it to be more objectionable than even an assignment to a trustee. The cases of Havens v. Hussey, Deming v. Colt, and Hayes v. Heyer were cited and approved.

[2] 3 Duer, 1. [3] 1 E. D. Smith (N. Y.), 341. [4] 13 Cal. 242.

and doing business at Shanghae, about nine hundred miles from Canton; but it appeared that, after the assignment, he had denied that he was a partner at the time of the failure, asserting that he had previously withdrawn from the firm. The other partner was a salaried partner, not sharing in the profits and losses, and, at the time of the assignment, was absent from China, on a trip to Calcutta. The court held the assignment valid.

§ 82. In the case of Robinson v. McIntosh,[1] in the New York Common Pleas, a copartnership assignment to trustees for the benefit of creditors, in all respects equitable and just to all parties, made in a condition of insolvency by the general and managing partners of a limited copartnership was sustained. Mr. Justice Woodruff observed: "Whatever doubts there may be in ordinary cases of the power of some of the members of a firm to make such a disposition of the property, while other members are present and equally entitled to a voice in the disposition, I do not doubt that we ought to sustain an assignment in all respects equitable and just to all parties, made in a condition of hopeless insolvency by all of those who, by the terms of the actual arrangement between the members, are the active managing partners in the business.

§ 83. In the case of McGregor v. Ellis,[2] in the Superior Court of Cincinnati, where the non-assigning partner was present and dissented, the court (Storer, J.), in an opinion reviewing the cases, expressed itself very strongly in favor of the doctrine that a transfer of the partnership property in trust for creditors by one partner was obligatory upon the others. And the same doctrine was applied in the case of Graves v. Hull,[3] in the Supreme Court of Texas.

§ 84. Robinson v. Gregory,[4] in the Supreme Court of

[1] 4 E. D. Smith, 221. [2] 2 Disn. (Ohio), 386. [3] 32 Tex. 665.

[4] 29 Barb. 560, referred to in Welles v. March, 30 N. Y. 344. Wright, J., observed: "Our judgment proceeded upon the ground that it was not competent for the two partners, without the consent or authority of the third, to make a gen-

New York, and affirmed at the Court of Appeals, is an important case. The firm consisted of three partners, one of whom was residing in Paris. The partnership affairs having become embarrassed, the two resident partners executed a general assignment of individual and partnership property, with preferences. The assignment was adjudged invalid in the court of last resort, but the opinion of the court is not reported. The court below placed its decision upon the ground that a partner who went abroad impliedly granted a power, in cases of emergency, to the remaining partners to act for him. This view of the law was regarded as incorrect by the appellate court.

In Pettee v. Orser,[1] in the Superior Court of New York, where an assignment was executed by two of four partners, the others of whom were absent temporarily on business, the conveyance was adjudged void.

§ 85. In the case of Welles v. March,[2] one of the partners had absconded, leaving a letter addressed to his copartner, saying among other things, "Take charge of everything in our business—close it up speedily," &c. The remaining partner thereupon executed a general assignment of the partnership property, which was assailed by judgment creditors as being fraudulent in fact, and not the act of the partners. The court were of opinion that the conduct and declaration of the absconding partner were such as to empower his copartner to execute the assignment. Mr. Justice Wright, who delivered the opinion of the court, said: "A general assignment to a trustee, of all the funds and effects of the partnership for the benefit of creditors, is the exercise of a power without the scope of the partnership enterprise, and amounts of itself to a suspension or dissolution of the partnership itself. It is no part of the ordinary business of the copart-

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eral assignment of the partnership property of a trustee. Our opinion was that no such power could be implied from the partnership relation."

[1] 6 Bosw. (N. Y.) 123; affi'd in Court of Appeals; see Ingraham, J., in Palmer v. Meyers, 43 Barb. 509 (1860).

[2] 30 N. Y. 344.

nership, but outside and subversive of it. No such authority as that can be implied from the partnership relation.[1] The assignment in the present case was without preference, but the principle of law to be applied to it is not affected by that circumstance." The case of Kelly v. Baker, where the facts were very similar, was rested on substantially the principle adopted in this case.

In the case of Palmer v. Myers,[2] where it appeared that one of the partners had absconded, and ineffectual efforts had been made to consult with him and obtain his consent to the execution of an assignment, it was held that evidence of these facts was admissible to sustain an assignment executed by the remaining partners. The court relied upon Kemp v. Carnley,[3] Deckard v. Case,[4] and Kelly v. Baker,[5] and with this agrees the case of National Bank v. Sackett.[6]

The case of Coope v. Bowles,[7] was substantially the same in its facts as Robinson v. Gregory,[8] and a similar conclusion was reached. Where it was provided in the copartnership agreement that either partner might dissolve or close up the copartnership upon the failure of the other partner to contribute his proportion of the capital, this was deemed a sufficient authority to enable one partner to execute a general assignment without the consent of his copartner.[9]

In the case of Stein v. La Dow,[10] in the Supreme Court of Minnesota, the rule was stated to be that under ordinary circumstances one partner may not, without the assent of the other, assign the firm property to a trustee for the benefit of the creditors, yet, if an extraordinary emergency occurs in the affairs of the partnership, and the non-assigning partner cannot be consulted on account of his absence

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[1] Johnson, J., concurred upon the ground of an express authority, see p. 353.
[2] 48 Barb. 509. [3] 3 Duer, 1. [4] 5 Watts, 22.
[5] 2 Hilt. 536. [6] 2 Daly, 395.
[7] 42 Barb. 87; s. c. 18 Abb. Pr. 442; 28 How. Pr. 10.
[8] 29 Barb. 560; rev'd in Court of Appeals, see Welles v. March, 30 N. Y. 344.
[9] Roberts v. Shepherd, 2 Daly, 110.
[10] 13 Minn. 412. Williams v. Frost, 27 Minn. 255.

under circumstances which furnish reasonable ground for inferring that he intended to confer upon the assigning partner authority to do any act for the firm which could be done with his concurrence if he were present, such an assignment, if fairly made, will be presumed, *prima facie*, to be valid. The temporary absence of one partner from the State was not regarded as sufficient to empower the remaining partner to execute an assignment of firm property.

In a late case[1] in Ohio, it was held that one of the members of an insolvent firm cannot, either before or after dissolution of the partnership, make a valid assignment of all its effects for the benefit of creditors, against the will of a copartner, or without his assent, when he is present or accessible.

§ 86. *Power of Partners to Assign—Summary.*—It will be seen, on an examination of the cases just reviewed, that those of them which deny the partner's power to assign in trust, place such denial on different grounds, which may be reduced to the following: that such an assignment works a dissolution of the copartnership;[2] that it is an act out of the course of trade, not contemplated by the contract of partnership, and not within the implied powers incident to the partnership relation; and that it is an act in fraud of the rights of other partners to participate in the distribution of the partnership funds among the creditors, and in the decision of the question which of the creditors, if any, should have a preference in payment out of the property assigned. The cases which affirm the power, place it, to some extent, on the general ground of being an implied power incident to the partnership relation, but more frequently on the ground of the relative situation of the partners, and the necessity of the case; as where it is impossible to consult the copartners, owing to their absence or other cause. The

[1] Holland v. Drake, 29 Ohio St. 441.

[2] On this point, the opinions of Mr. Justice Washington, in Pearpoint v. Graham, and of Chief Justice Marshall, in Anderson v. Tompkins, are in conflict. See *ante*, pp. 106, 107.

following propositions[1] appear to be deducible from the adjudged cases on the question now under consideration, and to be sustained by the weight of authority.

I. One partner may, without the assent of his copartner, assign a portion or the whole of the partnership effects directly to creditors in payment of partnership debts.[2]

II. One partner cannot make a general assignment of the partnership effects to a trustee for the benefit of creditors, even ratably, without the consent[3] or against the known wishes of the other partners, for the reason that no such authority can be implied from the partnership relation.[4]

III. Where a partner has relinquished all control of the partnership affairs by absconding, this will be regarded as evidence of an authority to the remaining partners to make an assignment either with or without preferences.[5]

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[1] It will be observed that the propositions laid down in the text differ from those contained in the previous edition. The cases in which assignments by one partner of partnership property, have been sustained, are here regarded not so much as exceptions and innovations upon the prevailing rule, as depending upon the evidence more or less conclusive of an express authority.

[2] Mills v. Barber, 4 Day, 428; Egberts v. Wood, 3 Paige, 517; Havens v. Hussey, 5 Id. 30; Deckard v. Case, 5 Watts, 22; Mabbett v. White, 12 N. Y. 442; Graser v. Stillwagen, 25 N. Y. 315.

[3] But he may, with the express consent of the other partners. Ely v. Hair, 16 B. Mon. 230; Baldwin v. Tynes, 19 Abb. Pr. (N. Y.) 32; Lowenstein v. Flauraud, 82 N. Y. 494; affirming 11 Hun, 399; Kelly v. Baker, 2 Hilt. 531; Roberts v. Shepherd, 2 Daly, 110. But the rule requiring all the partners to unite in the assignment does not apply to those who are liable as partners to third persons, but only to those who are partners as between each other. Adee v. Cornell, 25 Hun, 78.

[4] Robinson v. Gregory, cited in Welles v. March, 30 N. Y. 344; reversing s. c. 29 Barb. 560; Palmer v. Myers, 43 Barb. 509; Pettie v. Orser, 6 Bosw. 123; affi'd in Ct. of App. See Palmer v. Myers, 43 Barb. 509; Welles v. March, 30 N. Y. 344; Coope v. Bowles, 42 Barb. 87; Haggerty v. Granger, 15 How. 243; Paton v. Wright, Id. 481; Nat. Bk. v. Sackett, 2 Abb. Pr. N. S. 280; Stein v. La Dow, 18 Minn. 412; Bull v. Harris, 18 B. Mon. (Ky.) 195; Dunklin v. Kimball, 50 Ala. 251; Maughlin v. Tyler, 47 Md. 545; Wetter v. Schlieper, 4 E. D. Smith (N. Y.), 917; Sloan v. Moore, 37 Penn. St. 217; Dana v. Lull, 17 Vt. 390; Hook v. Stone, 34 Mo. 329; Hughes v. Ellison, 5 Id. 463; Drake v. Rogers, 6 Id. 317; Kirby v. Ingersoll, Harr. Ch. (Mich.) 172; s. c. 1 Doug. 477; Bowen v. Clark, 1 Biss. 128; Cleaver v. Brenzel, 1 Luz. Leg. Reg. 228. *Contra*, Ch. J. Marshall, in Anderson v. Tompkins, 1 Brock. 456; Hitchcock v. St. John, Hoff. Ch. 511; Robinson v. Crowder, 4 McCord, 519; McGregor v. Ellis, 2 Disn. (Ohio), 286; McCullough v. Sommerville, 8 Leigh, 415; Graves v. Hall, 32 Tex. 665; Gordon v. Cannon, 18 Gratt. 387; and see Deckard v. Case, 5 Watts, 22; Hennessy v. Western Bank, 6 Watts & Serg. 300; Egberts v. Wood, 3 Paige, 517; Lassell v. Tucker, 5 Sneed (Tenn.), 1; but see Barcroft v. Snodgrass, 1 Cold. (Tenn.) 430.

[5] Welles v. March, 30 N. Y. 344; Kemp v. Carnley, 3 Duer, 1; Palmer v. Myers, 43 Barb. 509; s. c. 29 How. Pr. 8; Deckard v. Case, 5 Watts, 22; Kelly v. Baker, 2 Hilt. 531; Nat. Bank v. Sackett, 2 Daly, 395.

IV. But the mere absence of a partner from the country, will not be regarded as conferring such a power upon the remaining partners.[1]

V. But where the absence or non-residence of the partner is coupled with other circumstances tending to show such an authority, especially where the assignment is made without preferences,[2] and in an extraordinary emergency, or where a subsequent ratification can be inferred,[3] the assignment will be sustained.[4]

The mere fact of the absence or residence of a partner out of the State does not seem to furnish the test for determining the validity of assignments by a copartner. Taken in connection with the fact that the latter is sole manager of the company's business, and the other a merely dormant or inactive partner, it would indeed be allowed its full weight, as in the case of McCullough v. Sommerville, where both facts appeared. But where the partners are equally active in the business, and especially where the business is transacted in different States, under the same firm or different firms, by partners resident at each place, the right of one to assign on the mere ground of the absence of the other, would be much less readily conceded.[5]

§ 87. It remains to notice the opinions of several eminent American jurists on this question of a partner's power of assignment; and these seem to have left it in much of its original uncertainty. The inclination of Mr. Justice Story's mind seems to have been against the power to assign *all* the

[1] Robinson v. Gregory, cited in Welles v. March, 30 N. Y. 344; rev'g s. c. 29 Barb. 560; Coope v. Bowles, 42 Barb. 87; s. c. 18 Abb. Pr. 442; Pettee v. Orser, 6 Bosw. 123; Stein v. La Dow, 13 Minn. 412.

[2] Pearpoint v. Graham, 4 Wash. C. C. 232; Hitchcock v. St. John, Hoff. Ch. 511; Dana v. Lull, 17 Vt. 390.

[3] Forbes v. Scannell, 13 Cal. 242; Stein v. La Dow, 13 Minn. 412; McGregor v. Ellis, 2 Disn. (Ohio), 286; Pearpoint v. Graham, 4 Wash. C. C. 232; McNutt v. Strayhorn, 39 Penn. St. 269; Holland v. Drake, 29 Ohio St. 441.

[4] Forbes v. Scannell, 13 Cal. 242; Stein v. La Dow, 13 Minn. 412; McCullough v. Sommerville, 8 Leigh, 415; McGregor v. Ellis, 2 Disn. (Ohio), 286; Pearpoint v. Graham, 4 Wash. C. C. 232; Harrison v. Sterry, 5 Cranch, 289.

[5] See Pearpoint v. Graham, 4 Wash. C. C. 232; and Hitchcock v. St. John, Hoff. Ch. 511, in which the facts were as above stated.

property of the partnership under *any* circumstances. In his Treatise on Partnership he observes; "It may well admit of some doubt whether this power extends to a general assignment of all the funds and effects of the partnership by one partner for the benefit of creditors; for such an assignment would seem to amount of itself to a suspension or dissolution of the partnership itself."[1] In a note to this passage, he cites Pearpoint v. Graham, Dana v. Lull, Cullum v. Bloodgood,[2] Deming v. Colt, Kirby v. Ingersoll, and Deckert v. Filbert.[3] He then extracts largely from the opinions of the court in the cases of Anderson v. Tompkins, Egberts v. Wood, Havens v. Hussey, and Hitchcock v. St. John, and sums up by observing: "There is no small difficulty in supporting the doctrine, even with qualifications, that one partner may make a general assignment of all the partnership property."[4] Chancellor Kent in his Commentaries,[5] remarks: "It is a point not quite settled, whether one partner, without the knowledge or consent of his copartner, though under circumstances, may not assign over all the partnership effects and credits, in the name of the firm, to pay the debts of the firm; and where all the creditors are admitted to an equal participation, the conclusion is *that he may*.[6] He may give a preference to one creditor over another; though whether it might be made to a trustee for that purpose, against the known wishes of the copartner, so as to terminate the partnership, was left an unsettled point in Egberts v. Wood."[7]

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[1] Story on Partn. § 101. The same view of the effect of such an assignment was taken by Mr. Justice Washington, in Pearpoint v. Graham, and by Chancellor Walworth, in Havens v. Hussey. But in Anderson v. Tompkins, Chief Justice Marshall held that such an assignment did not necessarily dissolve the contract of partnership; and the same was held by the Supreme Court of Pennsylvania, in Deckard v. Case, 5 Watts, 22.

[2] 15 Ala. 42.

[3] 3 Watts & Serg. 454.

[4] Story on Partn. § 101, n. 4.

[5] 3 Kent's Com. [44] 47, n.

[6] "Harrison v. Sterry, 5 Cranch, 289; Mills v. Barber, 4 Day, 428; Lamb v. Durant, 12 Mass. 54; Pothier Traité du Con. de Soc. Nos. 67, 69, 72, 90; Robinson v. Crowder, 4 McCord (S. C.), 519; Hodges v. Harris, 6 Pick. 360; Deckard v. Case, 5 Watts, 22; Hitchcock v. St. John, Hoff. Ch. 511; Anderson v. Tompkins, 1 Brock. 456."

[7] "3 Paige, 517. Same doubt expressed in Pearpoint v. Graham, 4 Wash. C. C. 232."

He then cites the case of Havens v. Hussey, as settling this point, and refers to some of the other cases on the subject.[1] The passage concludes as follows: "There is no small difficulty," says Mr. Justice Story, "in supporting the doctrine, even under qualifications, that one partner may make a general assignment of all the partnership property, so as to break up its operations.[2] This I consider to be the soundest conclusion to be drawn from the conflicting authorities."[3]

Mr. Parsons, in his work on Partnership,[4] refers to the subject in the following language: "Whether one partner may assign all the property in trust to pay creditors, the firm being insolvent, has been much doubted. That he may, in good faith, assign a part of the property to pay or secure an existing debt, or a debt to be contracted, is not doubted; and we think the weight of authority sanctions his assigning the whole property in trust for all the creditors, especially if this be done without preferences of any kind; although this has been questioned on the ground that such a transfer of itself operates a dissolution; but so, in fact, would the previous and actual insolvency, in effect, though not technically."

On the whole—while the law remains thus unsettled on this point—it may be laid down as the only safe practical rule, that in making assignments of partnership property, particularly to trustees, all the partners, special as well as general, dormant as well as active, should be consulted; and the assignment should either be the joint act of all, or should

[1] "Hitchcock v. St. John, Hoff. Ch. 516; Kirby v. Ingersoll, Harr. Ch. (Mich.) 174; Dana v. Lull, 17 Vt. 390: Gibson, Ch. J., 8 Watts & Serg. 63, S. P."

[2] "Story on Partn. pp. 145–150."

[3] Mr. Troubat, in his Treatise on the Law of Limited Partnership, states the rule, in regard to general partners, to be, that one partner may separately, at any time during the existence of the partnership, assign the effects and property of the firm, and prefer one of its creditors to another. "It is true," he adds, "that it was not without great doubt and difficulty that the courts could arrive at this conclusion, but it became *and is now the rule*, as far as such a rule can be established by the authority of the highest judicial tribunals in South Carolina, Connecticut, Massachusetts, and the United States as a federal body." Law of Commandatory and Limited Partnership in the United States, p. 390, § 393 (Phila. ed. 1853).

[4] Parsons on Partnership, p. 166.

be made by the express authority, or with the consent or concurrence of those who do not actually execute it, or subject to ratification on their part.

It is clear, however, that the right of one partner to dispose of partnership property is confined strictly to *personal* effects, and does not extend to *real* estate owned by the partnership.[1] One partner cannot convey away the real estate of the firm, without special authority.[2]

§ 88. *Power of each Partner to Assign his Interest.*— The power of each partner over his own share or interest of the partnership property stands upon an entirely different footing from his power over the partnership property generally. No partner owns absolutely any part of the property. His interest is an interest subject to the interest of his copartners.[3] While therefore he cannot transfer his share of any specific partnership property, he may transfer the interest which he has in the firm property, subject to the rights of his copartners; and he may make a valid assignment of this interest to trustees for the benefit of his creditors.[4] But such an assignment will pass only so much as may remain after the payment of the firm debts and a settlement with his copartners.[5]

An assignment by one partner of all his interest in the joint property to the other partner or partners works a dissolution of the firm,[6] and the remaining partner may there-

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[1] Anderson v. Tompkins, 1 Brock. 456; Brainerd, J., in Mills v. Barber, 4 Day, 428, 430; Shaw, C. J., in Tapley v. Butterfield, 1 Metc. 518; Carr, J., in McCullough v. Sommerville, 8 Leigh, 415, 438; Collyer on Partn. § 394; Story on Partn. § 101; Thompson v. Bowman, 6 Wall. 316; see Collumb v. Coldwell, 16 N. Y. 484; s. c. 24 N. Y. 505; Tieman v. Molliter, 71 Mo. 512.

[2] Collyer on Partn. § 394; Story on Partn. § 101. The separate property of a partner can in no case be conveyed, unless by an instrument executed by him. In re Wilson, 4 Barr, 430.

[3] Parsons on Part. p. 168.

[4] Fellows v. Greenleaf, 43 N. H. 421; Horton's Appeal, 13 Penn. St. 67; Kirby v. Schoonmaker, 3 Barb. Ch. 46; but see Haggerty v. Granger, 15 How. Pr. 243. And separate assignments by each of the partners of all his property to the same assignee convey the firm property. Boughton v. Crosby, 47 Conn. 577.

[5] See Platt v. Hunter, 11 N. Y. Weekly Dig. 300; Schiele v. Healy, 61 How. Pr. 73; Fellows v. Greenleaf, 43 N. H. 421.

[6] Horton's Appeal, 13 Penn. St. 617; Armstrong v. Fahnstock, 19 Md. 59;

upon execute an assignment of all his property, whether belonging to the previous firm or not, in trust for the payment of his individual creditors.[1]

§ 89. *Surviving Partners.*—As to the power of *surviving* partners, it has been held, in South Carolina, that a surviving partner, especially in case of insolvency, may assign the firm effects to a trustee for payment of debts.[2] But in New York it has been held, that after the dissolution of a copartnership, one of two surviving partners cannot, without the consent of the other, assign the partnership effects to trustees for the benefit of preferred creditors.[3] And it seems that in this State, since the adoption of the Revised Statutes, the surviving member of an insolvent firm is not authorized to give a preference in payment to some creditors of the firm over others; and that a general assignment made by him of the partnership effects to a trustee, for the purpose of securing a preference to some of the creditors, even with the assent of the legal representatives of the deceased partner, is invalid.[4]

But an assignment by a surviving partner, in all respects equitable and just, and made for the equal benefit of all creditors, is valid.[5]

Power v. Kirk, 1 Pitts. R. 510; Clark v. Wilson, 19 Penn. 414; Parsons on Part. p. 400.

[1] Clark v. McClelland's Assignee, 2 Grant (Pa.), 31; Clark v. Wilson, 19 Penn. St. 414; Power v. Kirk, 1 Pitts. R. 510; Marsh v. Bennett, 5 McLean, 117; Price v. De Ford, 18 Md. 489; Dimon v. Hazard, 32 N. Y. 35; Smith v. Howard, 20 How. Pr. 266. *Contra*, Heye v. Bolles, 33 How. Pr. 266; s.c. 2 Daly, 231.

[2] White v. Union Insurance Co. 1 Nott & McCord, 556; and see, in Virginia, Galt v. Callaud, 7 Leigh, 594. But the rule is otherwise in Tennessee. See Barcroft v. Snodgrass, 1 Cold. (Tenn.) 430; see Tieman v. Molliter, 71 Mo. 512; Vosper v. Kramer, 31 N. J. Eq. 420.

[3] Egberts v. Wood, 3 Paige, 517.

[4] Hutchinson v. Smith, 7 Paige, 26; Walworth, C., Id. 35, 36. In the case of Marsh v. Bennett, in the Circuit Court of the United States for the District of Michigan, it was held that by the dissolution of a partnership, provision being made in the articles of dissolution for the payment equally of all the creditors of the firm, by the partner who purchases the interest of the retiring partner and continues the business, such partner is a trustee for the creditors of the firm; and a subsequent assignment by such partner of the partnership effects, preferring certain creditors to others, and contrary to the stipulation in the articles of dissolution, is fraudulent and void. 5 McLean, 117.

[5] Loeschigk v. Hatfield, 5 Robt. 26; s. c. as Loeschigk v. Addison, 4 Abb. Pr. N. S. 210; affi'd, 51 N. Y. 660.

§ 90. *Limited Partnership.*—In almost if not quite all the States, restrictions have been placed by statute[1] upon the powers of limited partnerships and their members, when insolvent or in contemplation of insolvency, to make assignments. These restrictions in general prevent such partnerships and their members, under such circumstances, from giving any preferences to creditors.[2]

But although a limited partnership cannot make an assignment giving preferences, when insolvent or in contemplation of insolvency, nor can any member of such partnership make such assignment under like circumstances, yet an assignment for the benefit of creditors in all respects equitable and just to all parties, made in a condition of hopeless insolvency by all of those who, by the terms of the actual arrangement between the members, are the active managing partners in the business, will be sustained.[3]

And such assignment is valid when made by the general partner only.[4] But this has been doubted, unless the express consent of the special partner is contained in the partnership agreement, or can be inferred from the circumstances of the case.[5]

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[1] See *post*, Chap. X.

[2] See, on this subject, Troubát on Limited Partnership, c. 13.

[3] Robinson v. McIntosh, 3 E. D. Smith, 221; Jackson v. Sheldon, 9 Abb. 133; Hayes v. Heyer, 3 Sandf. 293; 4 Sandf. Ch. 485; Whitewright v. Stimpson, 2 Barb. 379; Greene v. Breck, 10 Abb. 43; Darrow v. Bruff, 36 How. 479; Mills v. Argall, 6 Paige, 582; s. c. 7 Paige, 586; 4 Sandf. Ch. 485; Van Alstyne v. Cook, 25 N. Y. 489.

[4] Robinson v. McIntosh, *supra*.

[5] Mills v. Argall, 6 Paige, 582; see Crary's Specl. Proceedings, vol. I, p. 714. On the insolvency of a limited partnership, the partnership property becomes a trust for the benefit of creditors; and if the partners neglect to place it in the hands of a trustee for immediate distribution among all the creditors ratably, any creditor may file a bill, on behalf of himself and all other creditors, for distribution of the partnership funds, without first obtaining a judgment at law. Innes v. Lansing, 7 Paige, 583; see Jackson v. Sheldon, 9 Abb. Pr. 127; Whitewright v. Stimpson, 2 Barb. 379; Darrow v. Bruff, 36 How. 479; McArthur v. Chase, 13 Gratt. 683.

An assignment by a general partnership in which a member of a limited partnership may be also a member, is not to be treated in view of these prohibitions as an assignment by the individual member of the limited partnership of his individual property. Fanshawe v. Lane, 16 Abb. 71.

CHAPTER V.

TO WHOM AN ASSIGNMENT MAY BE MADE; QUALIFICATIONS OF ASSIGNEES.

§ 91. *Who may be Assignee.*—A voluntary assignment for the benefit of creditors may be made either to a person who is a creditor of the assignor, or to one who is not a creditor,[1] and it may be made to a single individual or to several.[2] The persons to whom it is made are, from the usual form of the transfer, called *trustees* as well as *assignees;* the latter being the more general term by which they will be designated in the present work.

When the assignment is made to partners, it is not material whether they are designated by the firm name or their individual names, if the language used is such as to indicate with certainty the persons who are nominated as assignees.[3] Where it is intended to make the transfer to an assignee, he must be named in the instrument.[4] But where the convey-

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[1] Yates, J., in Wilt v. Franklin, 1 Binn. 502, 520; Lee, J., in Johnston v. Zane's Trustees, 11 Gratt. 552, 564; United States Bank v. Huth, 4 B. Mon. (Ky.) 423; Wooster v. Stanfield, 11 Iowa, 128; Frink v. Buss, 45 N. H. 325; see Layson v. Rowan, 7 Rob. (La.) 1. In Vermont, it has been provided by statute, that, in order to render an assignment operative against the creditors of the assignor, he shall be confined in the selection of an assignee to some one who is not at the time a creditor or interested in the provisions of the assignment. Act of November 19, 1852; Laws of 1852, p. 15, § 8. But in Virginia, in the case of Gordon v. Cannon (18 Gratt. 388), where the trustee was a creditor, and the trust was to secure his own demand amongst others, it was contended that the trust deed was a mortgage, and the trustee could not sell by the mere authority of the deed, and without resorting to a court of equity; the objection was not regarded as valid.

[2] Where made to several, only those who accept are required to act (Moir v. Brown, 14 Barb. 39); but those who accept must all act. Brennan v. Wilson, 4 Abb. N. C. 297; s. c. 71 N. Y. 502.

[3] Forbes v. Scannell, 13 Cal. 242.

[4] In the case of Reamer v. Lamberton (59 Penn. St. 462), where an assignment for the benefit of creditors, leaving a blank for the assignee's name, was executed and acknowledged, and an execution was afterwards issued against the assignor and put into the sheriff's hands, and subsequently the assignee's name was inserted and the assignment recorded, it was held that the title to the prop-

ance is declared by the court to be an assignment for creditors, and no trustee is named, the court will either regard the transferee as trustee,[1] or will name a trustee.[2]

The power to select and appoint his own assignee is one which the common law of voluntary assignments allows to every debtor contemplating such a disposition of his property;[3] and he is not bound to consult his creditors, or any of them, and obtain their previous consent to the appointment,[4] but may make his selection even against their will.[5] But this power is not to be exercised arbitrarily and without a proper reference to the interests of the creditors.[6]

In Wisconsin[7] the assignees must be residents, and in Minnesota,[8] both residents and freeholders of the State, otherwise the assignment will be void. In South Carolina,[9] the creditors are empowered to name an agent or agents to act jointly with the assignee named in the assignment.

In Kansas[10] and Ohio,[11] the creditors are empowered to select an assignee, who is substituted by the court in the place of the assignee named in the assignment; and to this end, methods are provided for convening the creditors and ascertaining who are entitled to participate in the choice.

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erty remained in the assignor till the assignee's name had been inserted and the assignment delivered to him, and the assignor's goods were not protected from the execution. See Park v. Glover, 28 Tex. 469.

[1] See Burrows v. Lehndorff, 8 Iowa, 96.

[2] So under statutes of Ohio (1 Rev. Stat. of Ohio [S. & C.], p. 713; R. S. [ed. 1880], § 6344) and Kentucky (Rev. Stat. of Kentucky, vol. I, p. 553). Gen. Stat. (ed. 1881), p. 491.

[3] Tilghman, C. J., in Wilt v. Franklin, 1 Binn. 502, 516; Sandford, A. V. C., in Cram v. Mitchell, 1 Sandf. Ch. 251, 253; and in Jackson v. Cornell, Id. 354. In Burd v. Smith (4 Dall. 76), this right was denied. But in all the subsequent Pennsylvania cases, it has been conceded.

[4] Harris, J., in Webb v. Daggett, 2 Barb. 9, 11.

[5] Id. Ibid.

[6] Sandford, A. V. C., in Cram v. Mitchell, 1 Sandf. Ch. 254; Roosevelt, J., in Childs v. Mouseley, N. Y. Supreme Ct. Sp. Term, Nov. 1854.

[7] Stat. of Wis. (ed. 1871), c. 63, vol. I, p. 843; R. S. of Wis. (ed. 1878), c. 80, p. 497.

[8] Stats. of Minn. (ed. 1878), p. 544.

[9] Rev. Stat. of S. C. (ed. 1873), c. 97, p. 477.

[10] Laws of 1876, c. 101; Comp. L. 1881, p. 103.

[11] Stat. of Ohio (Sayler), vol. IV, p. 3250, § 2; R. S. of Ohio (ed. 1880), § 6338.

An officer of the court, before whom the trustee is required to qualify, cannot himself be assignee and qualify before his deputy.[1]

In New York, it is provided that, whenever any incorporated company shall have refused the payment of any of its notes or other evidences of debt in specie or lawful money of the United States, it shall not be lawful for such company or any of its officers, to assign or transfer any of the property or choses in action of such company to any officer or stockholder of such company, directly or indirectly, for the payment of any debt.[2] But apart from the statute, a corporation may select one of its officers as assignee.[3]

§ 92. *Qualifications of Assignee.*—It is an essential qualification of an assignee, not only that he should be capable from age, health and education, of performing the duties of the office, but also that he should be of sufficient character and pecuniary ability to afford assurance to creditors that the fund will be safe in his hands, and that the trust will be properly administered;[4] and the selection of incompetent assignees will have the effect of rendering the assignment void.[5] Thus, where the debtor selected for assignees three relatives, one of whom was incapacitated by

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[1] Bancroft v. Snodgrass, 1 Cold. (Tenn.) 430.

[2] Rev. Stat. (7th ed.) vol. II, p. 1534.

[3] Pope v. Brandon, 2 Stew. 401. In Covert v. Rogers (38 Mich. 363), it was held that the fact that the assignee is or has been a stockholder of the insolvent corporation or is insolvent himself, does not disqualify him; but the jury may consider its bearing upon the good faith of the transaction.

[4] See observations of Tilghman, C. J., in Wilt v. Franklin, 1 Binn. 502, 516; Christiancy, J., in Angell v. Rosenbury, 12 Mich. 241; Flandrau, J., in Guerin v. Hunt, 6 Minn. 375; Jennings v. Prentice, 39 Mich. 421.

[5] This will depend upon the question whether the selection was made with a fraudulent intent. In the case of Guerin v. Hunt, Mr. Justice Flandrau laid down the rule as follows: "If it appears that the selection of an incompetent assignee was made in order to allow the assignor to control the administration of the estate, then the assignment will be declared void, because such an intent on the part of the assignor would be a fraud upon his creditors. If it should appear that the assignee was incompetent in fact from any cause, but that his selection was not made from any improper motive on the part of the assignor, then the assignee would be subject to removal at the instance of a creditor of the estate, and a proper person would be substituted by the court to carry out the trust.

his residence, one by blindness, and the third by his want of education, from executing the trust; it was held to be evidence of an intent, on the part of the assignor, to keep the control of the property in his own hands, or to appropriate it for his own use and benefit; and the assignment was therefore declared void.[1] So, where the debtor selected as his assignee, his brother, who at the time was unfit to attend to business by reason of a lingering disease which the assignor himself believed was incurable, and of which he died, the assignment was held for that cause to be fraudulent and void as against creditors; and it was considered by the court that the selection of such an assignee furnished strong presumption of an intent, on the part of the assignor, to keep the control and disposal of the property.[2]

§ 93. The selection of a person as assignee, who is known to the assignor to be insolvent, has been repeatedly pronounced by the courts to be a fraud upon the rights of creditors, as evincing an intention on the part of the assignor to place his property beyond their reach, or, in the language of the statute of fraudulent conveyances, "to delay or hinder them" in the collection of their debts.[3] But where the creditors are consulted, and consent to the assignment to a particular individual, such consent will rebut the presumption that there was any intention to commit a fraud, although the

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[1] Cram v. Mitchell, 1 Sandf. Ch. 251.

[2] Currie v. Hart, 2 Sandf. Ch. 353.

[3] Reed v. Emery, 8 Paige, 417; Walworth, C., Id. 418; Haggarty v. Pittman, 1 Id. 298; Connah v. Sedgwick, 1 Barb. 210; Browning v. Hart, 6 Id. 91; but see Shryock v. Waggoner, 28 Penn. St. 430; Angell v. Rosenbury, 12 Mich. 241; Jennings v. Prentice, 39 Id. 421.

The better doctrine in New York seems to be, that the mere fact that the assignee is insolvent will not avoid the assignment or furnish a ground for the removal of the assignee, especially now that the statute (Laws of 1877, c. 466) requires the assignee to give a bond. Pearce v. Beach, 12 How. Pr. 404; In re Paddock, 6 Id. 215.

Previous to the Wisconsin statute, a debtor might select any one as assignee, and his fitness could not be inquired into in a collateral action by a creditor, except for the purpose of showing fraudulent intent on the part of the assignor. Klauber v. Charlton, 47 Wis. 564.

The fact that the assignee is required by statute to give a bond, will not relieve the assignor from the exercise of prudence in selecting an assignee. Holmberg v. Dean, 21 Kans. 73.

assignee was known to be destitute of property, as the creditors would have the right to repose themselves upon his honesty only.[1]

The selection of members of the assignor's family, and of doubtful competency (such as a clerk and a journeyman boarding in his family, and both young men), as assignees, conduces, it has been held, to raise a presumption that there was a secret trust in the assignment for the benefit of the assignor.[2] And the selection of near relatives as assignees, especially where they are placed before all other creditors in the schedule of preferred debts, is a circumstance against the assignment.[3] But the relationship of the parties, though calculated to awaken suspicion, is of itself no evidence of fraud in a conveyance of property.[4] And in a case where all the parties to a deed of trust made by an insolvent debtor (viz., the debtor, the trustee and most of the secured creditors), were related, it was held that such relationship furnished no predicate for a legal presumption or conclusion of fraud, although it was a circumstance which might go to a jury, to be considered by them in connection with the other facts of the case, in determining the question of fraud in fact.[5]

In some of the States, the appointment of a competent and responsible assignee is provided for by statutory enactments, and in most of them he is required to execute

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[1] Walworth, C., in Reed v. Emery, 8 Paige, 417, 418. The creditors, indeed, may agree that the assignor himself shall act as trustee or agent in certain cases. Tompkins v. Wheeler, 16 Pet. 106, 120.

[2] Perkins, J., in Caldwell v. Rose, Smith (Ind.), 190; Caldwell v. Williams, 1 Ind. 405; Perkins, J., Id. 408.

[3] Sandford, A. V. C., in Cram v. Mitchell, 1 Sandf. Ch. 251, 255. In this case, as well as in Currie v. Hart, and in Connah v. Sedgwick, the assignees were relatives of the assignors.

[4] Bumpas v. Dotson, 7 Humph. 310; Nesbitt v. Digby, 13 Ill. 33; Baldwin v. Buckland, 11 Mich. 389; Shultz v. Hoagland, 85 N. Y. 464.

[5] Montgomery's Ex'rs v. Kirksey, 26 Ala. 172; and see, on this point, Dunlap v. Bournonville, 26 Penn. St. 72.

In Brahmstadt v. McWhirter (9 Neb. 6), it was held that a clerk of court might act as assignee, and his approval of his own bond did not render his acts void.

bonds with sureties for the faithful performance of the trust.[1]

An assignment by a religious corporation, in trust to pay debts, may be made to persons ineligible, under its charter, as general trustees of the society.[2]

It is an important preliminary to the making of an assignment, that the person selected as assignee be one who will accept the appointment and undertake the trust; as his refusal to act, after the execution and delivery of the instrument, might impair its effect or interfere with its operation.[3]

A debtor, having once appointed his assignee, cannot, by the assignment, reserve the right to name another person as successor of the assignee, in case the latter wishes to resign the trust.[4]

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[1] This branch of the subject will be particularly considered hereafter, under a distinct head. See Chap. XXXI.

[2] De Ruyter v. St. Peter's Church, 3 N. Y. 238.

[3] See *post*, Chap. XVIII.

[4] Planck v. Schermerhorn, 3 Barb. Ch. 644.

CHAPTER VI.

THE ASSIGNED PROPERTY; THE AMOUNT ASSIGNED; WHAT MAY BE ASSIGNED; WHAT PASSES BY THE ASSIGNMENT.

§ 94. *The Amount of Property Assigned.*—The amount of property embraced in, or intended to be conveyed by an assignment, determines its character as being general or partial. A general assignment is understood to import, in its nature, a transfer of *all* the debtor's property for the benefit of his creditors. The nature of the relation created by insolvency usually requires that the transfer should be of this comprehensive character. "Creditors," observes Chief Justice Marshall,[1] "have an equitable claim on *all* the property of their debtor, and it is his duty, as well as his right, to devote the *whole* of it to the satisfaction of their claims." Partial assignments, however, when not within the prohibition of any statute, and where they leave the unassigned residue open to creditors, are, as we shall see, valid conveyances.[2]

In some of the States an assignment of *all* the debtor's property is expressly required by statute, and in others assignments are construed to pass all the debtor's property, real and personal, whether specified in the assignment or not. Thus, in Connecticut,[3] an assignment for the benefit of creditors is void unless it embraces all the property of the assignor, except such as is exempt from execution, real estate situated out of the State, and, in the case of sole assignors, one hundred dollars in cash.

In Indiana,[4] the assignment must be accompanied by a

[1] In Brashear v. West, 7 Pet. 608.

[2] See *post*, Chap. IX.

[3] Gen. Stat. of Conn. (Rev. of 1875), p. 378; Act of 1858.

[4] Stat. of Ind. (Rev. 1876), vol. I, p. 142; Act of 1859. Under this statute, every assignment must be general, but the unintentional omission of property of trifling value, does not render the assignment fraudulent and void. Krug v. McGilliard, 76 Ind. 28.

schedule "containing a particular enumeration and description of all the personal property assigned," and the assignor is required to make oath that the assignment and schedule "contain a statement of all the property, rights and credits belonging to him, or of which he has any knowledge, and that he has not, directly or indirectly, transferred or reserved any sum of money or article of property for his own use or the benefit of any other person." And in Kentucky,[1] every assignment made in contemplation of insolvency, with the design to give a preference, operates as an assignment and transfer of all the property and effects of such debtor. In Maine,[2] assignments for the benefit of creditors are construed to pass all the estate of the debtor, whether specified therein or not. The assignor is also required to make oath to the truth of the assignment.[3] A similar provision is contained in the statutes of New Hampshire[4] and Texas.[5] In New Jersey also, the debtor is required to annex to his assignment an inventory, under oath or affirmation, of his estate, real and personal, according to the best of his knowledge.[6] In New York,[7] the assignor is required, at the date of making the assignment, or within twenty days thereafter, to file a verified inventory of all his estate at the date of the assignment, both real and personal, in law and equity, and the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the value of such estate according to the best knowledge of the assignor.

§ 95. Apart from all statutory provisions, it may be said that if there be nothing in the instrument or schedules annexed to it to limit or qualify its operation, a general assign-

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[1] Rev. Stat. of Ky. (Stanton), vol. I, p. 553; Gen. Sts. (1881), p. 490.

[2] Rev. Stat. of Me. (ed. 1871), p. 543, § 1. [3] Id. § 2.

[4] Gen. Stat. of N. H. (ed. 1867), p. 262; Gen. Laws of N. H. (ed. 1878), c. 140.

[5] Act of 1879, c. 53; p. 57; R. S. (ed. 1879), appendix, p. 5.

[6] Rev. Stat. (ed. 1874), p. 8; Rev. of 1878, p. 37; see Hays v. Doane, 11 N. J. Eq. 84.

[7] Laws of 1860, chap. 348; Rev. Stat. of N. Y. (7th ed.), vol. III, p. 2277.

ment by a debtor, of all his estate and effects, will pass to the assignee everything which is in its nature assignable, except such property as may be specially exempted by law, or excepted by the terms of the deed itself, where such exception is allowed.

It is, however, a leading rule in the construction of assignments by debtors, that no more property will pass to the assignee than is embraced in the terms of the instrument; and even where *all* the debtor's property is assigned, in terms, if there be subsequent words of description, or a reference to a schedule, as setting it forth particularly, the contents of such clause or schedule will operate to limit the general clause of transfer, and nothing will pass that is not so set forth or specified.[1]

§ 96. *Exemptions.*—There are, however, portions of a debtor's property which the law expressly exempts from the process of creditors; and these, of course, he is allowed to except and retain out of the general conveyance.[2] Provision is frequently made by statute for these exemptions. Thus, as we have seen in Connecticut,[3] the assignment is not required to embrace property exempt from execution, or real estate situated out of the State, or, in cases of sole assignors, one hundred dollars in cash. But where the debtor made no reservation in the instrument of the one hundred dollars so exempt, he was held to have waived his right to reserve the money.[4] In California, property exempt from execution, and insurance upon the life of the assignor, do not pass to the assignee by a general assignment for the benefit of creditors, unless the instrument especially mentions them, and declares an intention that they shall pass thereby.[5] In

[1] See *post*, Chap. VIII.

[2] Heckman v. Messenger, 49 Penn. St. 465; Mulford v. Shirk, 26 Penn. St. 473; Dow v. Platner, 16 N. Y. 562; Baldwin v. Peet, 22 Tex. 708; Garner v. Frederick, 18 Ind. 507; Smith v. Mitchell, 12 Mich. 180; Brooks v. Nichols, 17 Mich. 38; Farquharson v. McDonald, 2 Heisk. (Tenn.) 404; Sugg v. Tillman, 2 Swan, 208; see Simpson v. Roberts, 35 Ga. 180; Dolson v. Kerr, 5 Hun, 643.

[3] Gen. Stat. of Conn. (Rev. 1875), p. 378, § 1.

[4] Raymond's Appeal, 28 Conn. 47.

[5] Civ. Code Cal. § 2470.

Indiana, appraisers may set off to a resident householder property not exceeding six hundred dollars in value,[1] but this does not prevent the assignor from reserving in the assignment property exempt from execution.[2]

So in Michigan, an assignment is not void on its face for excepting property exempt from execution without specifying it,[3] and the assignor may select property exempt from execution after the execution of the instrument, and the assignee takes the property subject to this right of selection.[4] So in Maine[5] and New Hampshire,[6] exempt property does not pass to the assignee under the assignment; and in Pennsylvania,[7] where the assignor has included exempt property in the assignment, an appraisal will be made and the property will be set off to the debtor; and where the assignor expressly reserved the benefit of any and all exemption laws, this did not invalidate the assignment.[8] But in New Jersey an assignment of all his property by a debtor divests him of the personal right to claim what is by statute exempt from execution, and does not vest it in the assignee.[9] But in Tennessee, where an assignment in trust by a debtor, for the benefit of a portion of his creditors, conveyed all his property of every description, consisting of real and personal estate, &c., but reserved out of the personal effects so much as he was by law allowed to retain free from execution, it was held to be fraudulent and void in law, whether so intended or not.[10] In Ohio, it has been held that the assignor's

[1] Stat. of Ind. (Rev. 1876), vol. I, p. 144, § 9; amount increased to six hundred dollars by Laws of 1879, c. 50, p. 127. O'Neil v. Beck, 69 Ind. 239.

[2] Garner v. Frederick, 18 Ind. 407.

[3] Smith v. Mitchell, 12 Mich. 180; Hollister v. Loud, 2 Mich. 309, 310, 322.

[4] Brooks v. Nichols, 17 Mich. 38. The exemption is not lost by offering the exempted property for sale, or changing the place or conditions of occupation. Rosenthal v. Scott, 41 Mich. 632.

[5] Rev. Stat. of Maine (ed. 1871), p. 543, § 1.

[6] Gen. Stat. of N. H. c. 126, § 1, p. 262; Gen. Laws of N. H. (ed. 1878), c. 140.

[7] Act of May 4th, 1864; Purden's Dig. (Brightley), vol. I, p. 98, § 17.

[8] Heckman v. Messenger, 49 Penn. St. 465; see Mulford v. Shirk, 26 Penn. St. 473; Peterman's Appeal, 76 Penn. St. 279.

[9] Moses v. Thomas, 26 N. J. L. 124; Van Waggoner v. Moses, Id. 570.

[10] Sugg v. Tillman, 2 Swan, 208.

wife was entitled to an allowance in lieu of the homestead, against the assignee, though the family dwelling house had been burned previous to the sale by the assignee.[1]

§ 97. *Exception of Property not Exempt.*—It has sometimes been the practice to except, in addition to such articles as were exempted by law, other portions of property for the debtor's use; and it has been held that the insertion of such a clause of exception would not vitiate the assignment. Thus, in Maine, previous to the statute of April 1, 1836, concerning assignments, where the assignor excepted from the general conveyance of his property, "necessary and proper household furniture, and means of paying his small debts under fifty dollars, and ordinary family expenses," it was held that, as the excepted property did not pass to the assignee, but was left open to attachment as it was before, the exception did not vitiate the assignment.[2] But it was afterwards held in that State, that an exception of property not exempted by law, rendered an assignment void.[3] It is now declared by statute that assignments shall be construed to pass all the debtor's property, real and personal, whether specified in the assignment or not, which is not by law exempt from attachment.[4] In Mississippi, a deed of assignment by a bank for the benefit of its creditors, which conveys all its assets and property, except certain specified portions, to trustees, has been held not void because of the reservation.[5] In Pennsylvania, an assignment (stipulating for a release), excepting the household furniture of the assignors, *and* property exempt from execution, is voidable; but until an election by creditors to avoid it, conveyances by the assignees for value received by them, are valid.[6] But in

[1] Kelly v. Duffy, 31 Ohio St. 437; see also Hoge v. Hollister, 8 Baxter (Tenn.), 533.

[2] Canal Bank v. Cox, 6 Greenl. 395.

[3] Foster v. Libby, 24 Me. 448.

[4] See Act of March 21, 1844; Merrill v. Wilson, 29 Me. 58.

[5] Ingraham v. Grigg, 13 Sm. & M. 22.

[6] Johns v. Bolton, 12 Penn. St. 339; Boker v. Crookshank, 1 Phila. 198.

other cases in that State it has been held that the reservation from a general assignment for the benefit of creditors of certain specified property, without any stipulation, reservation, or condition, in favor of the assignor, does not render it void as to creditors.[1] And even where all the debtor's property passes under the assignment by reason of statutory enactment, the fact that a foreign tribunal will not give efficacy to the assignment, and that certain real property of the debtor situated elsewhere may not pass, owing to such construction, will not invalidate the assignment.[2] And an express exception from the grant of a portion of the property, as, for instance, a claim against certain persons then in suit, there being no reservation of any benefit from or interest in the property actually assigned, does not invalidate an assignment,[3] nor does the insertion of the clause "except what is by law exempt," when in fact none is exempt.[4] Considering the present general inclination of the courts against all reservations in assignments for the debtor's own benefit, the safest rule is to avoid these clauses altogether.

§ 98. *When the Assignment must Embrace all.*—Assignments containing a stipulation for the release of the debtor (even where such stipulations are allowed) are, in

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[1] Knight v. Waterman, 86 Penn. 258; Heckman v. Messenger, 49 Penn. St. 465. In Bausman's Appeal (90 Penn. St. 178), the court say: "The general right of the assignor to except and reserve from the assignment property to the value of $300 is undoubted. He may not do so out of land to the injury of one holding a lien for the purchase money, or a judgment lien in which the exemption from execution is waived. His claim, however, must be restricted to some property which he owned, or in which he had an interest at the time of the assignment, or, at the farthest, to the proceeds for which that property was sold. It cannot extend to money made by the assignee's care, management, and use of the assigned property." Wiley's Appeal, 90 Penn. St. 173. Where the debtor assigned reserving property exempt by law, and afterward a creditor recovered judgment against him on a note containing a waiver of exemption, it was held that the creditor must assert the waiver by execution or attachment against the reservation, and had no standing to claim in the distribution of the fund assigned. Myers' Appeal, 78 Penn. St. 452; see Numbers v. Shelly, Id. 426.

[2] Frink v. Buss, 45 N. H. 325.

[3] Carpenter v. Underwood, 19 N. Y. 520; see Bates v. Ableman, 13 Wis. 644; Baldwin v. Peet, 22 Tex. 702; Foster v. Libby, 24 Me. 448; Moss v. Humphrey, 8 Greene (Iowa), 443.

[4] Dodd v. Hills, 21 Kans. 707.

most of the States, invalid unless they contain a transfer of *all* the debtor's property;[1] but assignments with preferences not conveying all the property are not necessarily void for that reason.[2]

In Rhode Island it has been held that an assignment which, on its face, purports to convey all the assignor's property, when, in fact, he has other property not disclosed in the assignment, is void as against creditors; but if it does not so purport, it is valid, notwithstanding property may remain in the hands of the assignor unassigned.[3] And, in Massachusetts, an assignment by partners, not purporting to transfer their whole property, but only their partnership property, and not purporting to transfer their separate property, nor alleging that they had no separate property (and it not appearing elsewhere that they had no separate property), and providing for a discharge from their entire partnership debts, was held to be repugnant to the insolvent laws of the State.[4]

But in Maine, the provisions of the act of 1844, that an assignment shall be construed to pass all property not exempt from attachment, whether specified in such assignment or not, will not bring the private property of partners within an assignment of property belonging to the copartnership.[5] In Michigan an assignment has been held void for not including[6] the assignor's real estate; but an express omission of property subject to specific claims, did not necessarily invalidate an assignment.[7]

§ 99. *Proportion of Amount assigned to Debts.*—Where an assignment is made for the benefit of *particular* creditors, the proportion which the amount of property assigned

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[1] See *post*, Chap. XI.

[2] See *post*, Chap. XI.

[3] Pierce v. Jackson, 2 R. I. 35.

[4] Shaw, C. J., in Wyles v. Beals, 1 Gray, 233, 236.

[5] Simmons v. Curtis, 41 Me. 373.

[6] Price v. Haynes, 37 Mich. 487.

[7] Henry v. Root, 38 Mich. 371.

bears to the amount of debts provided for is frequently an important consideration. If a debtor in failing circumstances makes an assignment of this character, and the value of the property assigned is more than the parties could have reasonably supposed necessary to satisfy the claims of the creditors provided for, fraud may be inferred from that circumstance alone, unless a satisfactory excuse is shown for the transfer of the excess.[1] Such a transaction affords ground for the conclusion that the assignment was upon some secret or implied understanding between the parties, to keep the surplus from other creditors, and for the benefit of the debtor himself.[2] But where, at the time of making the assignment, it is doubtful whether the property assigned will be sufficient to satisfy the claims of the creditors for whose benefit it was made, a mere nominal excess in the amount of the property over that of the debts, will not justify a conclusion of fraud. Thus, where the debts provided for were upwards of $26,000, and the whole nominal amount of property and demands assigned, including $21,000 of outstanding claims, was short of $34,000, the court refused to pronounce the transaction fraudulent, considering it probable that there would not be any excess after making due allowance for bad debts, and deducting the expenses of collection and of executing the trust.[3] The same principle has been applied to deeds of trust for the security of particular creditors, which are so common in the southern States.[4]

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[1] Beck v. Burdett, 1 Paige, 305; Stetson v. Miller, 36 Ala. 642; see Longmire v. Goode, 38 Ala. 577; Watkins v. Jenkins, 24 Ga. 431; Du Bose v. Carlisle, 51 Ala. 590.

[2] Butler v. Stoddard, 7 Paige, 168; Walworth, C., Id. 165.

[3] Beck v. Burdett, 1 Paige, 305; Walworth, C., Id. 309.

[4] Burgin v. Burgin, 1 Ired. L. 458. In this case it was remarked by the court as follows: "With respect to the amount of property, it must be remembered that, as it cannot be ascertained what accidents may occur to diminish the perishable part of it, or lessen its value, or how old accounts will turn out upon collection, it is usual to convey more in mortgage or trust, by way of security, than it may be supposed will precisely meet the demand. It is indeed fair that the creditor should have ample security; and therefore it furnishes no conclusive argument of a dishonest purpose, if the deed conveys property of value fully to cover

The proportion between the amount assigned and the debts provided for was also a material consideration in Massachusetts, in cases where the system of assignment which prevailed in that State prior to the regulation of assignments by statute. In those cases the proportion to be observed was between the amount of property assigned and the debts of the creditors who became parties to the assignment. If more was assigned than such debts amounted to, the surplus was open to attachment by other creditors of the assignor; but if such debts equaled or exceeded the amount of the assigned property, they had the prior and better title, and nothing remained to be reached by an attachment.[1]

§ 100. *What may be Assigned.*—An assignment for the benefit of creditors may embrace every description of property which is, in its nature, assignable; and, when purporting or intended to be a general disposition of the assignor's property, should be in good faith a transfer of the whole, including real[2] and personal estate, debts and choses in action. Among these,[3] may be more particularly mentioned lands; interests in lands or real estate, such as the inter-

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the debts, under any and all contingencies that may be expected or reasonably apprehended. But it is equally true that, under the pretense of securing a debt, the debtor may convey much more than is necessary for that purpose, and really for securing the use to himself and baffling his other creditors. Hence the question is one of intention," &c. Id. 459. In Johnson v. Thweatt (18 Ala. 741), where the property conveyed was of much greater value than the aggregate of the debts intended to be secured, the deed was held to be fraudulent and void on its face as against creditors. It contained, however, other objectionable provisions, in Georgia, an assignment by an insolvent debtor to his creditor of effects to an amount greater than the debt, in which it is stipulated that any surplus remaining in the hands of the assignee, after satisfying his debt and paying the expenses of reducing the effects to cash, shall be subject to the order of the assignor, is not, upon its face, void under the statute of 1818; though the excess is a badge of fraud to be considered by a jury. Banks v. Clapp, 12 Ga. 514; Walkins v. Jenks, 24 Ga. 431.

[1] Shaw, C. J., in Foster v. Saco Manufacturing Co. 12 Pick. 451, 454; see Russell v. Woodward, 10 Id. 408; Hastings v. Baldwin, 17 Mass. 552; Adams v. Blodgett, 2 Woodb. & Min. 233.

[2] In Price v. Haynes (37 Mich. 487), an assignment was held void because it did not include the assignor's real estate.

[3] Some of the rules given under this head have been established with particular reference to that class of assignments called *special* assignments, which do not always contemplate provision for creditors. But most of them appear to have an equal application to general assignments by debtors.

ests of a purchaser,[1] mortgagor,[2] lessor,[3] mortgagee, lessee, and tenants for life;[4] profits of lands;[5] goods,[6] merchandise, stock and other descriptions of personal property; debts,[7] and choses in action generally;[8] including promissory notes,

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[1] A purchaser's right to a deed of land, agreed to be conveyed, is assignable. Thus, a bond for the conveyance of land is assignable. Halbert v. Deering, 4 Littell, 9; Brown v. Chambers, 12 Ala. 697; Ensign v. Kellogg, 4 Pick. 1. A right to call on a trustee to convey an estate in fee, is an equitable interest or chose in action, which may be assigned. Coverdale v. Aldrich, 19 Pick. 391, 395. The assignment of a contract to convey an interest in real estate, upon the performance of certain conditions, vests an equitable interest therein in the assignee, which will be protected and made available by courts of law. Dyer v. Burnham, 25 Me. 9. A vendor's lien for purchase money is assignable. Fisher v. Johnson, 5 Ind. 492; but see Inglehart v. Armiger, 1 Bland, 519.

[2] A statutory right to redeem a mortgage, after the sale of an equity, is assignable. Bigelow v. Willson, 1 Pick. 485; see Reed v. Bigelow, 5 Id. 281; Graves v. McFarlane, 2 Cold. (Tenn.) 167; Birdwell v. Cain, 1 Cold. (Tenn.) 301.

[3] See Demarest v. Willard, 8 Cow. 206; Willard v. Tillman, 2 Hill (N. Y.), 274.

[4] See Outcalt v. Van Winkle, 1 Green Ch. 513; Emmons v. Cairns, 3 Barb. 243; Graham v. Newman, 21 Ala. 397. The interest of a tenant at will, in real estate, is not such an interest as can be assigned. Whittemore v. Gibbs, 16 N. H. 485. In Georgia, an estate at will, growing out of the statute of frauds, is assignable, but if created by the acts of the parties under the common law, it is not. Cody v. Quarterman, 12 Ga. 386.

[5] A growing crop of cotton may be conveyed by deed of trust. Robinson v. Mauldin, 11 Ala. 977; Bellamy v. Bellamy's Adm'r, 6 Fla. 52. So, growing crops of wheat, rye and oats. Cochran v. Paris, 11 Gratt. 348; Dance v. Seaman, Id. 778; Montgomery's Ex'rs v. Kirksey, 26 Ala. 172.

[6] Goods of a debtor which are the subject of an action may be assigned. There is nothing improper in embracing in an assignment, goods attached under restraining orders out of chancery, nor in making provision to procure security to obtain the release of those goods, nor in providing for the defense of the suits. Vernon v. Morton, 8 Dana, 247, 252. But the assignment of all the goods of a debtor in Cincinnati and elsewhere, and "that might hereafter be purchased," is fraudulent and void, the goods being in the hands of auctioneers. Shaw v. Lowry, Wright (Ohio Ch.), 190. By statute in Ohio mortgaged chattels pass to the assignee, though the condition of the mortgage has been broken. Ingram v. Lindeman, 12 Reptr. 664.

[7] A part only of one entire debt cannot be assigned without the consent of the debtor. Gibson v. Cooke, 20 Pick. 15; 2 Kent's Com. [552] 688 and n. A contingent debt may be assigned in equity. Crocker v. Whitney, 10 Mass. 316, 319. An assignment of debts due to a firm passes only the balance of a debt after setting off a claim not yet due, held by the debtor against the firm. Fry v. Boyd, 3 Gratt. 73. The plaintiff cannot assign a debt the subject of a suit during the pendency of the suit, to the prejudice of a third person. Westbrook v. McDowell, Ga. Dec. part 1, 133. A debtor cannot revive and transfer to his assignee a debt due to him which he has in fraud of creditors discharged. Brownell v. Curtis, 10 Paige, 210; Browning v. Hart, 6 Barb. 91, 95.

[8] Spring v. S. Carolina Ins. Co. 8 Wheat. 268; Dehner v. Helmbacher Mills, 7 Ill. App. (Brad.) 47. The doctrine of the common law, that choses in action are not assignable, does not obtain in Iowa. Watson v. Hankins, 13 Iowa, 547. All choses in action may be assigned in equity. Dobyns v. McGovern, 15 Miss. 662; Bell v. Lond. & N. W. Railway Co. 21 Eng. L. & Eq. 566; Parsons, C. J., in

bills of exchange,[1] bonds,[2] covenants to indemnify,[3] book accounts,[4] and balances of account;[5] interests in personal contracts,[6] policies of insurance,[7] and all vested rights *ad rem* and *in re*;[8] possibilities coupled with an interest,[9] con-

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Dix v. Cobb, 4 Mass. 508, 511; Sewell, C. J., in Brown v. Maine Bank, 11 Id. 153, 157; Parker v. Grout, Id. Ibid. n.; Wheeler v. Wheeler, 9 Cow. 34; Morton, J., in Eastman v. Wright, 6 Pick. 316, 322; Welch v. Mandeville, 2 Wheat. 233, 236; Corser v. Craig, 1 Wash. C. C. 424; Smith v. N. Y. & N. H. R. R. 28 Barb. 605; Grocers' Nat. Bank v. Clark, 48 Id. 26; see Williams v. Galt, 95 Ill. 172.

[1] But a note or bill payable wholly or partly in personal services is not assignable. Bothick v. Purdy, 3 Mo. 82; Halbert v. Deering, 4 Littell, 9; Henry v. Hughes, 1 J. J. Marsh. 454; see Ransom v. Jones, 1 Scam. 291.

[2] Bac. Abr. Assignment (A); see Minor v. Edwards, 10 Mo. 671; Knighton v. Tufli, 11 Id. 581; see Ensign v. Kellogg, 4 Pick. 1.

[3] A written promise of indemnity, whether under seal or not, is assignable under the statute in Indiana. Fletcher v. Piatt, 7 Blackf. 522.

[4] Dix v. Cobb, 4 Mass. 508; Norris v. Douglass, 2 South. 817; Woodbridge v. Perkins, 3 Day, 364; but see Wright v. Williamson, 2 Penn. 965; Anderson v. Tompkins, 1 Brock. 456; Newman v. Vickery, 1 Smith (Ind.), 363; Kindrick v. Glover, Ga. Dec. part 1, 63; Forepaugh v. Appold, 17 B. Mon. (Ky.) 625; Walter v. Whitbeck, 9 Fla. 86. A debt for goods sold, of which the evidence rests on an account book, is assignable. Dix v. Cobb, 4 Mass. 511; Norris v. Douglass, 5 N. J. L. 817; Woodbridge v. Perkins, 3 Day, 364.

[5] Crocker v. Whitney, 10 Mass. 316, 319; Bartlett v. Pearson, 29 Me. 9; Westcott v. Potter, 40 Vt. 271.

[6] A contract for the performance of personal duties or services is not assignable. Halbert v. Deering, 4 Littell, 9, 10; Henry v. Hughes, 1 J. J. Marsh. 454; Marcum v. Hereford, 8 Dana, 1; Davenport v. Gentry's Adm'r, 9 B. Mon. 427. A covenant to pay a sum in promissory notes is assignable by statute in Kentucky. Sirlott v. Tandy, 3 Dana, 142. In Arkansas, an agreement for the delivery of property may be assigned. Lafferty v. Rutherford, 5 Ark. 649. A contract is assignable only where the entire interest therein can pass by the assignment, both legal and equitable. White v. Buck, 7 B. Mon. 546. A contract on which personal representatives can sue is assignable. Sears v. Conover, 34 Barb. 330. A contract for the labor of convicts. Prindle v. Carruthers, 15 N. Y. 425. A contract for grading a street. St. Louis v. Clemens, 42 Mo. 69; see Taylor v. Palmer, 31 Cal. 240.

[7] Spring v. S. Carolina Ins. Co. 8 Wheat. 268; Brichta v. New York Lafayette Ins. Co. 2 Hall, 372; Gourdon v. Ins. Co. of North America, 3 Yeates, 327; 1 Binn. 480, n.; Cleveland v. Clap, 5 Mass. 201; Wakefield v. Martin, 3 Id. 558. As to the necessity of assent on the part of the insurers, to the validity of the assignment, see Carroll v. Boston Marine Ins. Co. 8 Mass. 515; Lazarus v. Commonwealth Ins. Co. 5 Pick. 76; Brichta v. N. Y. Lafayette Ins. Co. 2 Hall, 372; and see De Rouge v. Elliott, 23 N. J. Eq. 486; Emerick v. Coakley, 35 Md. 188; Van Dine v. Willett, 38 Barb. 319; see Bliss on Life Ins. p. 375.

[8] Story, J., in Comegys v. Vasse, 1 Pet. 193. Certificates issued for sums awarded by the Secretary of the Treasury under the treaty with Mexico of April 11, 1839, and the acts of Congress of June 12, 1840, and September 1, 1841, are legally assignable. Baldwin v. Ely, 9 How. 580. An interest created by a pledge of personal property may be assigned. Russell v. Filmore, 15 Vt. 130.

[9] Story, J., in Comegys v. Vasse, 1 Pet. 193; Wilde, J., in Bigelow v. Willson, 1 Pick. 485, 492, 493, citing 3 Term R. 88; Shep. Touch. 239; Nimmo v. Davis, 7 Tex. 26. By the Revised Statutes of New York, a mere possibility coupled

tingent interests and expectancies,[1] and claims growing out of and adhering to property;[2] rights of action for damages,[3]

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with an interest is capable of being conveyed or assigned at law as well as in equity, in the same manner as an estate or interest in possession. 1 R. S. 725, § 35; 3 R. S. (7th ed.) p. 2178; Lawrence v. Bayard, 7 Paige, 70; see Emmons v. Cairns, 3 Barb. 243, 245.

[1] Wilde, J., in Bigelow v. Willson, 1 Pick. 485, 493; Mitchell v. Winslow, 2 Story, 630; Ivison v. Grassiot, 27 Eng. L. & Eq. 483; Nimmo v. Davis, 7 Tex. 26; Cooper v. Douglass, 44 Barb. 409. A thing existing in expectation, and not *in esse*, may be assigned, as a right to a distributive share in the profits of a voyage not yet commenced. Gardner v. Hoeg, 18 Pick. 168; but see Robinson v. Macdonnell, 5 M. & S. 228, 236; McNeeley v. Hart, 10 Ired. L. 63. Courts of equity support assignments of contingent interests and expectancies, and also of things which have no present actual or potential existence, but rest in mere possibility only. Story, J., in Mitchell v. Winslow, 2 Story, 630, 639. A mere gratuity, such as an anticipated donation from the State, is not assignable. This was so held by the Supreme Court of New York, in Munsell v. Lewis (4 Hill, 635, 638), in regard to an extra allowance made by statute to contractors on a public work, where it was claimed by the assignee of the original contract. But the Court of Errors (s. c. on error, 2 Den. 224) reversed the decision, holding such extra allowance to be not a gratuity, but rather an equitable compensation to cover extra expenses.

A legacy may be assigned. Ex'rs of Luce v. Park, 17 N. J. Eq. 415; Brooks v. Brooks, 12 S. Ca. 422; See v. Zabriskie, 28 N. J. Eq. 422. So the right of an heir to an inheritance. Grayson v. Sandford, 12 La. An. 646; Fitzgerald v. Vestal, 4 Sneed (Tenn.), 258; but see McDonald v. McDonald, 5 Jones Eq. (N. Ca.) 211; Needles v. Needles, 7 Ohio St. 432. The moment a man has acquired an exclusive interest in anything, though it should be but a contingent and executory interest, he may dispose of it, if not forbidden by law. Graham v. Henry, 17 Tex. 164. The bid of a purchaser at sheriff's sale is assignable. Blount v. Davis, 2 Dev. 19.

[2] Story, J., in Comegys v. Vasse, 1 Pet. 193.

[3] Whitaker v. Gavit, 18 Conn. 522. A right of action for a mere personal tort which dies with the party, and does not survive to his personal representative, is not assignable. Story, J., in Comegys v. Vasse, *ub. sup.*

In Gardner v. Adams (12 Wend. 297), a right of action in trover was held to be not assignable. But see Hall v. Robinson, 2 N. Y. 293; see Pulver v. Harris, 52 N. Y. 73. In Jackson v. Losee (4 Sandf. Ch. 381), a right of action in replevin was held to be assignable. And in McKee v. Judd (12 N. Y. 622), it was held by the Court of Appeals, that a right of action for the wrongful taking and conversion of personal property is assignable; and that an assignment by a debtor, of all his property and estate, transfers a right of action existing in his favor, for such tortious conversion. The decision in this case has been followed in the cases of Foy v. Troy & Boston R. R. Co. 24 Barb. 382, and The People v. Hud. R. R. R. Co. 4 Duer, 74. In Pennsylvania, it has been held that where a wrong-doer, or his estate, has derived a benefit from his wrong, a right of action will in general survive against them and pass by general assignment for the benefit of creditors, but personal wrongs do not. Sibbald's Estate, 18 Penn. St. 249. In Shultz v. Christman (6 Mo. App. 338), it was held that a right of action against a director, to recover for loss sustained by the assigning bank through the fraudulent sale to it of its own stock by such director, being essentially a right of property as distinguished from a personal tort, passes by the assignment to the assignee. In England, the rule as to the assignability of rights of action was clearly laid down by Lord Denman, in the case of Rogers v. Spence, in the Exchequer Chamber (13 Mees. & W. 571, 580), which was under the bankrupt act of 6 Geo. IV, c. 16, in the following terms: "That, as the object of the law is manifestly to

interests in actions pending and undetermined,[1] judgments and executions,[2] and decrees in equity;[3] and claims against the United States.[4] Unpaid subscriptions to the stock of a corporation will pass under a general assignment.[5]

§ 101. *What Passes under General Terms.*—These and whatever else is capable of assignment, may be made the subject of conveyance in an assignment. Where general words are employed purporting to convey the debtor's entire

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benefit creditors, by making all the pecuniary means and property of the bankrupt available to their payment, it has, in furtherance of this object, been construed largely so as to pass not only what in strictness may be called the property and debts of the bankrupt but also those rights of action to which he was entitled, for the purpose of recovering, *in specie*, real or personal property, or damages, in respect of that which has been unlawfully diminished in value, withheld or taken from him. But causes of action not falling within this description, but arising out of a wrong personal to the bankrupt, for which he would be entitled to remedy whether his property was diminished or impaired or not, are clearly not within the letter, and have never been held to be within the spirit of the enactments, even in cases where injuries of this kind may have been accompanied or followed by losses of property; and to this class, we think, the action of trespass *quare clausum fregit*, and that of trespass to the goods of the bankrupt, must be considered to belong." In Marshall v. Means (12 Ga. 61), a mere right to file a bill in equity was held to be not assignable. And it seems generally that all such rights of action for a tort as would survive to the personal representatives, may be assigned so as to pass to the assignee. Butler v. N. Y. & Erie R. R. Co. 22 Barb. 110; Hodgman v. Western R. R. Co. 7 How. 492; Patten v. Wilson, 34 Penn. St. 299; Jordan v. Gellen, 44 N. H. 424. So a right of action against a common carrier for negligence in not delivering goods. Jordan v. Gellen, *supra*. Cause of action for malicious prosecution not assignable even after verdict. Lawrence v. Martin, 22 Cal. 174.

[1] Such as an award, report, or judgment which might be obtained or recovered in a suit pending. Leitch v. Hollister, 4 N. Y. 211. A plaintiff on the record, in an action of trespass *de bonis asportatis*, may assign his interest in the damages sought by the suit. *Aliter*, as to the plaintiff in an action of slander, or assault and battery. North v. Turner, 9 Serg. & R. 244; Gibson, J., Id. 248, 249. Goods which have been attached under restraining orders out of chancery, may be assigned, where the orders authorize their restoration to the debtors, upon their giving the necessary security for their return, and provision is made in the assignment for giving such security. Vernon v. Morton, 8 Dana, 247, 252.

[2] Dunn v. Snell, 15 Mass. 481; Brown v. Maine Bank, 11 Id. 158; Pearson v. Talbot, 4 Littell, 435; Vanhouten v. Reily, 6 Sm. & M. 440; Becton v. Ferguson, 22 Ala. 599. In North Carolina, the assignment of a judgment is held void at law, and a court of law cannot notice it. Ferebee v. Doxey, 6 Ired. L. 446. In Indiana, the legal interest in a judgment is not assignable, either by the statute or common law. Richardville v. Cummins, 5 Blackf. 48; see Moore v. Ireland, 1 Ind. 531.

[3] Coates' Ex'r v. Muse's Adm'rs, 1 Brock. 552; Shotwell v. Webb, 23 Miss. 375.

[4] Goodman v. Niblack, 102 U. S. 556; Stanford v. Lockwood, 24 Hun, 291; see Morgan v. United States, 14 Ct. of Claims, 319.

[5] Lionberger v. Broadway Savings Bank, 10 Mo. App. 499; Shultz v. Sutter, 3 Id. 137.

estate, questions frequently arise as to what will be construed as included in the assignment, and assignees for the benefit of creditors are sometimes clothed by statute with rights in reference to the assigned property which the assignor could not himself assert, and which, therefore, he could not convey. A few particulars in reference to the subjects thus suggested remain to be noticed.

§ 102. *Foreign Property.*—As a rule, an assignment, valid where made, will pass the title to personal property wherever situated, but this general proposition is subject to limitations and qualifications hereafter to be considered. With regard to mere incorporeal rights, such as debts, the established rule seems to be that an assignment, valid where made, will operate upon them wherever due,[1] and will preclude their subsequent attachment.[2] Under a general assignment, a claim passes for indemnity against a foreign government, as for an illegal capture[3] or detention of a vessel; and such a claim will pass under the words "all debts due the grantor."[4]

§ 103. *Claims for Damages for Torts.*—Claims growing out of mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment.[5] But rights of action for the wrongful taking and conversion of personal property are assignable, and will pass by an assignment of all the debtor's property and estate.[6] So claims for torts to personal prop-

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[1] Caskie v. Webster, 2 Wall. Jr. 131; Speed v. May, 17 Penn. St. 91; Guillaudet v. Howell, 35 N. Y. 657; see Burrows v. Keays, 37 Mich. 430; Harrison v. Farmers' Bank, 9 W. Va. 424.

[2] Kerr, J., in Holmes v. Remsen, 4 Johns. Ch. 460, 487.

[3] U. S. v. Hunter, 5 Mason, 62; see Comegys v. Vasse, 1 Pet. 193; Couch v. Delaplaine, 2 N. Y. 397; Maitland v. Newton, 3 Leigh, 714.

[4] Griffin's Ex'r v. Macaulay's Adm'r, 7 Gratt. 476.

[5] Comegys v. Vasse, 1 Pet. 193; Sibbald's Estate, 18 Penn. St. 249; Jordan v. Gellen, 44 N. H. 424; Lawrence v. Martin, 22 Cal. 174.

[6] McKee v. Judd, 12 N. Y. 622; Jackson v. Losee, 4 Sandf. Ch. 381; Coffin v. McLean, 80 N. Y. 560; Patten v. Wilson, 34 Penn. St. 299; Jordan v. Gellen, 44 N. H. 424. See *ante*, p. 146, n. 3.

erty may be assigned;[1] though, in some States, they are held not to pass unless specifically included in the assignment. Thus, in Connecticut, where a debtor, having a claim against a person for wilfully and maliciously mutilating the model of a propeller belonging to him, made an assignment under the statute of 1828, but through mistake the claim was omitted, although intended and agreed to be assigned; it was held, on a bill filed by the purchaser of such claim from the assignee, that the claim not having been included in the assignment, there was no assignment thereof in writing, pursuant to the statute, and that the complainant was not entitled to the relief sought.[2]

§ 104. *Wife's Property.*—Under an assignment by an insolvent debtor, whatever rights he may have in the property of his wife, acquired by virtue of his marriage, will pass to the assignee.[3] But an assignment of real estate by a debtor does not divest his wife's right of dower, unless she be a party to the assignment[4] or an accompanying deed. Nor does an assignment of all an insolvent's estate for the benefit of creditors pass a *chose* in action of the wife, unless specially included.[5]

In Ohio it is provided by statute,[6] that in certain cases the wife of the assignor may ask the court to have the real estate sold free of her contingent right of dower, and to allow her a sum of money in lieu thereof. Such action on her part is equivalent to a release of her dower interest in the property sold.

§ 105. *Leasehold Interests.*—Under the general words, "all his personal estate and effects whatever," a deed of as-

[1] See Rogers v. Spence, 13 Mees. & W. 571, and other cases cited, *ante*, p. 146, n. 3.

[2] Whitaker v. Gavit, 18 Conn. 522.

[3] Outcalt v. Van Winkle, 1 Green Ch. 513. This was a case of assignment under an insolvent law.

[4] Helfrich v. Obermyer, 15 Penn. St. 113.

[5] Eshelman v. Shuman, 13 Penn. St. 561.

[6] Laws of 1880, p. 190; amending R. S. § 6350; see Dwyer v. Garlough, 31 Ohio St. 158. As to dower, see, further, § 123.

signment of leasehold premises, by way of mortgage, has been held to pass.[1] So, under the general words (following the more particular description), "all other the personal estate and effects of [the assignor], whatsoever or wheresoever," it was held that the lease of a mill passed to the assignee.[2] So an assignment in favor of creditors conveying all real and personal property and estates, whatever and wheresoever situate, and all interest therein, will pass the interest of the assignee of a lease equitably assigned.[3]

§ 106. *Interests of Devisees.*—An assignment of all a debtor's estate and effects will pass the interest of the debtor as a devisee of property, even though the property may have been devised in trust, to be conveyed to the debtor for his own proper use, and without being liable for his debts.[4] But where lands were devised, and charged with legacies, and, by agreement among the parties, the legacies were apportioned among the devisees; and one of the devisees assigned his property for the benefit of creditors—it was held in Pennsylvania that the assignee took the land subject to the charge of the legacies so apportioned.[5] A legacy is assignable and passes the whole right of the assignor.[6]

§ 107. *Interests of Heirs.*—Where real estate was placed in the hands of a trustee, to be conveyed to T.'s appointee, or, in failure of the appointment, to her heirs at law, and she died without making an appointment, and an heir of T. made a general assignment for the benefit of his creditors, of all his lands, tenements and hereditaments, goods and chattels, &c., and all his right, title and interest in and to the same—it was held that his share in the real estate in the hands of such trustee, passed by the assignment.[7]

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[1] West v. Steward, 14 Mees. & W. 47.

[2] Ringer v. Cann, 8 Mees. & W. 343.

[3] Astor v. Lent, 6 Bosw. 612. [4] Stuchert v. Harvey, 1 Miles, 247.

[5] Swoyer's Appeal, 5 Barr, 377; and see Couch v. Delaplaine, 2 N. Y. 397; Brooks v. Brooks, 12 S. Ca. 422.

[6] Ex'rs of Luce v. Park, 17 N. J. Eq. 415; see Miller's Appeal, 35 Penn. St. 481.

[7] Coverdale v. Aldrich, 19 Pick. 391.

§ 108. *Rents.*—An assignment of estate passes a right to rents subsequently falling due, and the debtor cannot afterwards lease, or assign the rents as against creditors.[1] And where a railroad company leased their road, with the provision that a share of the future earnings should be applied by the lessee to the payment of the lessor's debts, it was held that both the actual and potential interests passed to the assignee for the benefit of creditors, and that both the lease and the rent were capable of inventory and appraisement, under the Pennsylvania statute.[2]

§ 109. *Money in Bank.*—A general assignment of all a debtor's property passes a deposit to his credit in a bank, and carries to the assignee all the right which the depositor had in the deposit at the date of the assignment. And the bank has no lien, in such case, upon the deposit for the amount of a bill of exchange, indorsed by the depositor, and discounted by the bank, but which bill has not yet matured.[3]

§ 110. *Property Fraudulently Transferred by Assignor.*—Under the common law of assignments the assignee stands in the place of the assignor, and can assert no claim to property which the assignor might not. The assignment therefore does not carry with it to the trustee the title to property which the assignor has previously transferred in fraud of his creditors, for the purpose of hindering, delaying and de-

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[1] Williamson v. Richardson, 6 Mon. 604; see Pratt v. Lovan, 1 Miles, 358. The father of the assignor bequeathed the income of certain property in trust for the benefit of the assignor and his wife during their lives. Held that the assignor's share passed by the assignment. See v. Zabriskie, 28 N. J. Eq. 422.

[2] Brittenbender v. Sunbury & Erie Railroad Co. 40 Penn. St. 269.

[3] Beckwith v. Union Bank, 4 Sandf. S. C. 604; affi'd on appeal, 9 N.Y. 211; see Buckner v. Sayre, 18 B. Mon. 745; Coates v. First Nat. Bank, 47 N.Y. Super. Ct. 322; Simonton v. First Nat. Bank, 24 Minn. 216.

As between the holder of a check which is an equitable assignment of a fund on deposit with a bank, and an assignee for the benefit of creditors, the former is entitled to the fund to the extent of the check. First Nat. Bank v. Coates, 12 Reptr. 514. Money laid aside by a banking firm to be returned to a general depositor, but not amounting to the latter's full credit, is covered by a subsequent general assignment of the firm if not tendered and accepted before the assignment. Coots v. Topping, 39 Mich. 742.

frauding them.[1] But under the statutes of some of the States, the powers of assignees in this respect have been extended. Thus in New York the trustee of "an insolvent estate, corporation, association, partnership or individual, may, for the benefit of creditors or others interested in the estate or property so held in trust, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of any creditor, including themselves and others, interested, in any estate or property held by or of right belonging to any such trustee or estate."[2] And the assignee is empowered to maintain an action against any person who has received, taken, or in any manner interfered with the estate, property and effects of the debtor in fraud of his creditors.[3]

So under the Connecticut statute, the assignee may maintain an action to set aside a fraudulent conveyance made by the assignor.[4] But when proceedings are not commenced under the insolvent act of that State within sixty days, a conveyance, though made with the intent to defraud creditors, will not be set aside under the act nor at common law unless the purchaser participated in the fraud.[5] So in Maine, all property conveyed or transferred by the assignor previous to and in contemplation of the assignment, with the design to defeat, delay or defraud creditors, or to give a preference to one creditor over another, passes to the assignee by the assignment, notwithstanding such transfer, and the assignee may recover, collect and apply it for the benefit of creditors.[6]

§ 111. *What does not Pass.*—Where the general partner

[1] Brownell v. Curtis, 10 Paige, 210; Browning v. Hart, 6 Barb. 91; Leach v. Kelsey, 7 Barb. 466; Van Dyke v. Christ, 7 Watts & Serg. 373; Lord Tenterden, in Jones v. Yates, 9 Barn. & Cres. 532; Van Heusen v. Radcliffe, 17 N. Y. 580; Estabrook v. Messersmith, 18 Wis. 545; Hawks v. Pritzlaff, 51 Wis. 160; Flower v. Cornish, 25 Minn. 473; Heinrichs v. Woods, 7 Mo. App. 236; Hanes v. Tiffany, 25 Ohio St. 549.

[2] L. of 1858, c. 314; Rev. Stat. (7th ed.) vol. III, p. 2330.

[3] Ib. § 2. Southard v. Benner, 72 N. Y. 424; Ball v. Slafter, 26 Hun, 353; Leonard v. Claflin, Id. 288; Miller v. Halsey, 4 Abb. N. S. 28, 33; McMahon v. Allen, 35 N. Y. 403; s. c. 32 How. Pr. 313.

[4] Thomas v. Beck, 39 Conn. 241; Shipman v. Ætna Ins. Co. 29 Conn. 245; Palmer v. Thayer, 28 Conn. 257; Robertson v. Todd, 31 Conn. 555.

[5] Sisson v. Roath, 30 Conn. 15.

[6] Rev. Stat. of Maine (ed. 1871), c. 70, § 8; see further, on this section, Ch. XXXII.

(in a special partnership conducted in his name) made a general assignment of his property for the benefit of creditors, and used no language showing an intention to assign the property of the firm, it was held that the partnership property did not pass by the assignment.[1] And where one partner makes an assignment for the benefit of creditors, this gives to his assignee no control over the partnership funds or claims so as to release them.[2] The interest conveyed is only the interest in the surplus after the company's debts are paid.[3] An assignment of "all the assignor's goods and chattels, wares and merchandises, rights, credits, notes, accounts and demands," does not pass his interest in a sum of money borrowed by him, and then in the course of transmission to him from the lender.[4] Nor does an assignment of "all the bills, drafts, promissory notes, negotiable securities of every name and nature belonging to" the assignor's firm and connected with the business of said firm, pass a bill or note transferred to the maker of the deed by indorsement merely for purposes of collection.[5] But under the words "all debts due the grantor," the indebtedness of a partner of the grantor to the partnership will pass.[6]

Where a creditor assigned a distil-house in M. and land and wharf adjoining, "and all the rum and other liquors in the distil-house, or on the wharf, or elsewhere on the premises, and all the casks, &c., and other *personal property* whatsoever, being on the premises of, or belonging to," the debtor—it was held that barrels of rum previously consigned to a commission merchant in B. for sale, did not pass by the assignment.[7] In Pennsylvania, before the act of April 11, 1848, by which all a married woman's property is exempted

[1] Merrill v. Wilson, 29 Me. 58.

Property held in trust by the surviving partners of an old firm who have formed a new one, will not pass to an assignee for the benefit of the individual creditors of the surviving partners and the creditors of the new firm. Tieman v. Molliter, 71 Mo. 512.

[2] Moddewell v. Keever, 8 Watts & S. 63.

[3] Fellows v. Greenleaf, 43 N. H. 421. [4] Sheldon v. Dodge, 4 Den. 217.

[5] Worthington v. Greer, 17 B. Mon. (Ky.) 741.

[6] Griffin's Ex'r v. Macaulay's Adm'r, 7 Gratt. 476.

[7] Tucker v. Clesby, 12 Pick. 22.

entirely from her husband's control, and from liability for his debts, it was held that a legacy to a wife did not pass by a voluntary assignment.[1] And in the same State, where a person holding land in trust for another, who paid the purchase money, conveyed the legal title to the latter; but, before the deed was recorded, made an assignment of all his property for the benefit of his creditors who should agree to release their debts, on receiving their share of the estate, and a release was executed accordingly—it was held that the assignment passed no interest in such trust land, although the assignor was in possession, and the creditors had no notice of the trust until after the execution of the release.[2]

§ 112. *After Acquired Property.*—Where purchases are made by a firm some time before an assignment, but arrive subsequently, the title thereto vests in the assignee, the seller having failed to exercise the right of stoppage *in transitu;* but property, the title to which is acquired subsequent to the assignment, does not pass,[3] nor a cause of action accruing to the assignor after the date of the assignment but before its delivery.[4] A trade-mark does not pass to the assignee,[5] nor will the title to bank stock until the statutory requirement has been complied with, when it is necessary that the transfer should be entered on the corporate records.[6] But an assignment of a particular claim passes all the remedies and securities which the assignor possesses, although not named or set forth in the assignment.[7]

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[1] Skinner's Appeal, 5 Barr, 262. As to dower, and choses in action of the wife, see *ante*, p. 149.

[2] Ludwig v. Highley, 5 Barr, 132.

[3] McCabe's Appeal, 22 Penn. St. 427; Haskins v. Alcott, 13 Ohio St. 210; Shipman v. Graves, 41 Mich. 675; Lorenz v. Orlady, 87 Penn. St. 228. The assignee "under chapter 80, R. S., gets no title to property in transit at the time of making the assignment, and which is not mentioned or referred to in the assignment or the required inventory, and where neither the vendor nor the vendee ever intended that the title should vest in such vendee making the assignment, notwithstanding he may get the property into his actual possession." Clark v. Bartlett, 50 Wis. 543; see Lacker v. Rhoads, 51 N. Y. 641; reversing 45 Barb. 499.

[4] Crow v. Colton, 7 Daly, 52.

[5] Bradley v. Norton, 33 Conn. 158. *Contra*, Matter of Knox, 1 Monthly L. Bulletin, 47; see Milliken v. Dart, 26 Hun, 24; Hegeman v. Hegeman, 8 Daly, 1. As to a patent, see Campbell v. James, 2 Fed. Reptr. 338; 5 Id. 806; reversed in Supreme Ct. 3 Morr. Trans. 439.

[6] Fiske v. Carr, 20 Me. 301.

[7] Mehaffy v. Share, 2 Penn. (Penr. & W.) 361.

CHAPTER VII.

FOR WHOSE BENEFIT AN ASSIGNMENT MAY BE MADE.

§ 113. Assignments may be made not only for the benefit of *creditors*, strictly so called, that is, persons to whom the assignor is actually indebted,[1] but also for the benefit of persons who have incurred *responsibilities* on his behalf, such as sureties,[2] indorsers,[3] and bail;[4] actual liabilities being as proper subjects of security by assignment, as debts due.[5] This is called, by Mr. Justice Story,[6] "a clear principle." Nothing, in fact, is more common than for debtors, on the eve of failing, to assign property for the security of indorsers, sureties on bonds in the custom house, &c.[7]

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[1] One to whom another is liable on a contract, express or implied, though contingently, is a creditor from the time the liability is entered into, within the meaning of the statute of 13 Elizabeth. Foote v. Cobb, 18 Ala. 585. A creditor may honestly obtain a security for a debt known or believed to exist, though unliquidated. Ruffin, C. J., in Dewey v. Littlejohn, 2 Ired. Eq. 495, 504.

[2] Stevens v. Bell, 6 Mass. 339; Ingram v. Kirkpatrick, 6 Ired. Eq. 463; Wiswall v. Potts, 5 Jones' Eq. (N. Ca.) 184; Loeschigk v. Jacobson, 26 How. Pr. 526: Dickson v. Rawson, 5 Ohio St. 218; see Lill v. Brant, 6 Ill. App. (Bradw.) 366.

[3] Griffin v. Marquardt, 21 N. Y. 121; Stoddard v. Tomlinson, 10 Ala. 824; Copeland v. Weld, 8 Me. 411; Bank v. Cox, 6 Me. 395; Keteltas v. Wilson, 36 Barb. 298; s. c. 23 How. Pr. 69; Bank v. Talcott, 22 Barb. 550; Vaughan v. Evans, 1 Hill Ch. 414; Cunningham v. Freeborn, 11 Wend. 241; s. c. 3 Paige, 537; Halsey v. Whitney, 4 Mason, 206; Duvall v. Raisin, 7 Mo. 449. Indorsers are viewed by courts as creditors, and a deed of assignment for their security is valid although no payment had been made by them at the time of the execution of the deed. In the case of Griffin v. Marquardt (Id. ibid. *supra*), the assignee was directed to pay the amount of certain notes not yet due to the indorsers; this provision was regarded as in effect the same as if the direction had been in favor of the holders of the notes. As to future indorsers, see *post*, p. 156.

[4] Woodward v. Braynard, 6 Mart. (La.) 572; but see Wallon v. Scott, 10 Watts, 237; Price v. Moses, 10 Rich. Law, 454, 562.

[5] Canal Bank v. Cox, 6 Greenl. 395; Halsey v. Whitney, 4 Mason, 206, 231; Stevens v. Bell, 6 Mass. 339; Hendricks v. Robinson, 2 Johns. Ch. 283; Loeschigk v. Jacobson, 26 How. Pr. 526.

[6] In Halsey v. Whitney, 4 Mason, 206, 231; see also Dance v. Seaman, 11 Gratt. 778, 782.

[7] Parker, C. J., in Cushing v. Gore, 15 Mass. 69, 74; see United States v. Hoyt, 1 Blatch. C. C. 332. By the Massachusetts act of April 15, 1836 (Stat. of 1836, c. 238), it was formally declared that indorsers and sureties might be considered as creditors within the provisions of the act.

§ 114. *Sureties, Future Responsibilities, &c.*—In regard to official sureties, the decisions have not been uniform. In the case of Dewey v. Littlejohn,[1] it was held in North Carolina, that a person who is appointed to a public office, for the faithful performance of the duties of which he is bound to give sureties, may properly indemnify such sureties by a deed of trust on his property. In this case, a debtor who had executed a deed of trust for the benefit of his creditors, had made provision in it for the security of the sureties in a bond given by him for the performance of his duties as clerk and master of the court of equity. The deed was objected to, in this particular, as being against good morals and public policy, especially as it included *future* as well as past breaches of duty; but the objection was overruled by the court. But in the case of Currie v. Hart,[2] in the Court of Chancery of New York, for the first circuit, where an assignment had been made by a sheriff of official fees due and to become due, having for one of its objects an indemnity of his sureties against future misappropriation of moneys which should be collected on executions, it was held to be void.[3]

§ 115. *Future and Contingent Liabilities*—Assignments for the benefit of persons who may incur liabilities for the assignor at a *future period* in the shape of advances, suretyships, and the like, will not be sustained.[4] But deeds of trust in the nature of mortgages to secure such persons do not come within this rule.[5]

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[1] 2 Ired. Eq. 495.

[2] 2 Sandf. Ch. 353.

[3] The assistant vice chancellor, in this case, expressed an opinion to this effect, but waived a formal decision of the point; the assignment being held void on several other grounds. In Alabama, a deed of trust executed by a defaulting guardian, to indemnify and save harmless his securities, was held valid. Hopkins v. Scott, 20 Ala. 179.

[4] Barnum v. Hempstead, 7 Paige, 598, 570; Lansing v. Woodworth, 1 Sandf. Ch. 43; and see Griffin v. Marquardt, 21 N. Y. 121; Brainerd v. Dunning, 30 N. Y. 211; Neuffer v. Pardue, 3 Sneed (Tenn.), 191; Caruthers, J., Id. 193, 194; Whallon v. Scott, 10 Watts, 237. It is said that where there is a trust for payment of debts, it extends only to debts existing at the time of its execution. 1 Madd. Ch. 433.

[5] Hendricks v. Robinson, 2 Johns. Ch. 283, 308; affi'd on error, 17 Johns.

The proposition here stated in no wise limits the right of a debtor to provide for contingent liabilities, provided the liability is based on an existing right or obligation.[1] The fact that the liability is contingent does not constitute a valid objection, for an assignment to protect a contingent liability no more hinders or delays creditors than one to pay a debt not yet due, even if the assignee is not authorized to pay such debt before its maturity, for the assignee has a right to retain sufficient funds in his hands to meet such liability and distribute the residue, and, after the liability is disposed of, distribute the balance.[2]

§ 116. *Secured Debts.*—It is no objection to a provision for creditors by an assignment that they have already been secured by judgment or mortgage.[3] But such a provision will be considered as made subject to the equity as between the creditors to have the mortgage debt paid out of the mortgaged property.[4] Where one of the creditors had obtained a lien by attachment, and in an assignment subsequently executed he was preferred to the amount which should be found due in the attachment proceedings, provided they were sustained and were a lien, this provision was not considered objectionable, either as being uncertain or as giving an improper preference.[5] When the assignment is, by its terms or by operation of law, for the equal benefit of all the creditors, secured creditors will be paid their dividends on the amount which may be found due to them, after applying the security to the discharge of the

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488; United States v. Howe, 3 Cranch, 73; Marshall, C. J., Shunos v. Caig, 7 Cranch, 34.

[1] Brainerd v. Dunning, 30 N. Y. 211; Griffin v. Marquardt, 21 N. Y. 121; Read v. Worthington, 9 Bosw. (N. Y.) 617; Loeschigk v. Jacobson, 26 How. Pr. 526; s. c. 2 Robt. 645; Hawkins v. May, 12 Ala. 673; Grant v. Chapman, 38 N. Y. 293.

[2] Loeschigk v. Jacobson, 26 How. Pr. 526; Bump on Fraud. Conv. 388.

[3] Strong v. Skinner, 4 Barb. 546; Paige, J., Id. 559; Perry Ins. & Trust Co. v. Foster, 58 Ala. 502.

[4] Dimon v. Delmonico, 35 Barb. 554.

[5] Grant v. Chapman, 38 N. Y. 293.

debt.[1] The securities held by the debtor should be set forth in the inventory. An omission to refer to them in the assignment will not be regarded as a badge of fraud.[2]

§ 117. *Fictitious and Fraudulent Debts.*—The debts secured by the assignment must be the debts of the assignors, which are actually owing or for which a liability has been contracted. Any attempt on the part of the debtor to create a secret trust by providing for the payment of fictitious debts, or for an amount greater than that for which he is liable, will be evidence of an intent to defraud creditors.[3]

The question whether provision in the assignment for the payment of a fictitious debt will invalidate the entire assignment, or whether the instrument will be sustained for the benefit of creditors who have not participated in the fraud, has given rise to conflicting decisions. It will be seen, from the cases referred to in the notes, that the preponderance of authority seems to be in favor of the opinion that the assignment will be held good as to all debts that are *bona fide;* and this rule would undoubtedly prevail in those States where provision is made by statute for testing the validity of claims presented to the assignee for payment under the assignment.[4]

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[1] Wurtz v. Hart, 13 Iowa, 515.

[2] Stern v. Fisher, 32 Barb. 198. See further, on this subject, § 440.

[3] In Lockhard v. Brodie (1 Tenn. Ch. 384), it is said that the insertion of a debt as due, or intended to be secured, when in fact no such sum was due, is conclusive evidence of an intent to hinder and delay creditors, and the deed must be set aside as void; citing Peacock v. Thompkins, Meigs, 317, 329; Gibbs v. Thompson, 7 Humph. 179; Bumpas v. Dotson, 7 Humph. 310; Jacobs v. Remsen, 36 N. Y. 668; but see Kayser v. Heavenrich, 5 Kan. 324.

So, in New York, it has been held that the schedules under the act of 1860 are still to be regarded as part of the assignment, and when they contain fictitious debts the assignment will be deemed fraudulent. Terry v. Butler, 43 Barb. 395.

But, in the case of Pinneo v. Hart (30 Mo. 561), the fact that some of the claims in the list of preferred debts were fictitious, and that the assignee was aware of their fraudulent character, was not regarded as ground for avoiding the assignment. The duty of the trustee in such cases is to disregard the fraudulent or fictitious claims. And see Kayser v. Heavenrich, 5 Kan. 324.

[4] In Mackintosh v. Corner (33 Md. 607), Mr. Justice Alvey, discussing this question, says: "It by no means follows that because some of the preferred debts may be fraudulent, and therefore void, that the assignment itself, intended as it is for the benefit of all the creditors, should be declared a nullity. Some of the

But a debt is not fictitious because the statute of frauds, if interposed, would prevent its enforcement.[1] Where the deed was made to secure not only the debt of the grantor, but also of a third party, the deed was held void only to the extent of the debts of the third party.[2]

§ 118. *Usurious Debts.*—Whether an assignment for the payment of debts, which intentionally provides for the payment of notes and other securities, together with usurious premiums, which are included therein, would not of itself be void, under the usury laws of New York, is a question which was noticed, but not decided, in the case of

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debts claiming priority may be founded in fraud, and still the general assignment be good as to all debts that are *bona fide*. Indeed, it is the duty of the trustee under such an assignment to resist and defeat all claims founded in fraud, and which would operate to the prejudice of *bona fide* creditors; it not being supposed that the trustee accepts such a trust except for real and *bona fide* creditors."

So Mr. Justice English, in Hempstead v. Johnston (18 Ark. 137): "If it be assumed * * that they (the debts) were simulated, the deed of trust would, nevertheless, be valid as to the other beneficiaries, unless it had been shown that they were privy to the insertion of the simulated claims for fraudulent purposes." Citing Anderson v. Hook, 9 Ala. 704; Tatum v. Hunter, 14 Ib. 557.

So, in Hardcastle v. Fisher (24 Mo. 75), Mr. Justice Leonard observed: "We think it pretty well settled by the course of decisions in this State, in reference to a voluntary assignment, that the fraud of one or more of the creditors does not defeat it altogether, and render it wholly ineffectual in favor of the others; and we are not disposed, after reconsidering the matter, to change the course of adjudication upon this subject. The courts of Virginia, North Carolina, and Alabama have taken the same view. Anderson v. Hook, 9 Ala. 704; Perry Ins. & Trust Co. v. Foster, 58 Ala. 502; Sewall v. Henry, 5 Gratt. 31; Harris v. DeGraffenried, 11 Ired. L. 89; Brannock v. Brannock, 10 Id. 428. But, in New York, the old rule, void in part, void *in toto*, seems to be adhered to and applied to these transactions. Fiedler v. Day, 2 Sandf. S. C. 596."

But in the New York case of Kavanagh v. Beckwith (44 Barb. 195), where it appeared that certain preferred debts were named at a larger amount than the sums actually due, Mr. Justice James C. Smith said: "The overstatements of the amounts of the preferred debts do not make the assignments *necessarily* fraudulent. The assignees are not bound to pay the debts at the amounts therein specified. The provisions of the assignment upon that point are the following: The assignees are first required, in general terms, to pay 'the debts due or to grow due from the assignor, *or for which he is liable*, to the following persons.' In the schedules subsequently filed the debts were named at the actual amounts due. This was regarded as evidence of an honest intent. The fact, also, that the debts were referred to in the assignment as being *about* certain amounts, and that the books of account from which the amounts were taken had not been written up for several months, was regarded as evidence rebutting the fraudulent intent." In the case of Jacobs v. Remsen (36 N. Y. 671), the Court of Appeals sustained a charge to the jury, in which they were told that if any portion of the preferred claims were fictitious, the assignment would be fraudulent and void. And see cases cited in notes, p. 158.

[1] Livermore v. Northrup, 44 N. Y. 107.

[2] Harvey's Adm'r v. Steptoe's Adm'r, 17 Gratt. 289.

Pratt v. Adams, in the Court of Chancery.[1] The chancellor said it was a question which the parties who came in to claim under the assignment could not raise. For, if the assignment was void, none of them were entitled to claim a preference under it and at the same time to insist upon its illegality in respect to the claims of others whose debts, whether valid or not, the assignor intended to provide for specifically. The provision, however, in any event, was held to be good only to the extent of the amount actually and honestly due from the assignor, rejecting the usurious excess. And even this benefit, it was held, could only be claimed under an assignment providing in terms for the payment of the usurious claims. A general provision for the payment of debts in an assignment, would not include debts founded upon a usurious consideration. In the later case of Murray v. Judson, in the Court of Appeals,[2] it was expressly held that a general assignment by an insolvent debtor, of his property to a trustee for the payment of his debts, is not void on account of its providing for the payment of an irregular and usurious judgment, giving it priority over other debts, if it be in other respects free from objection, and that it is not a fraud upon other creditors for a debtor to pay or provide for the payment of a usurious debt. Gardner, J., said that the question in the case was not whether a provision for a usurious debt may not, in certain cases, be evidence more or less cogent of a fraudulent intent on the part of the debtor, but whether the law will permit a trust for that purpose, to any extent, under any circumstances.

In North Carolina, it has been held that a deed of trust made to secure a single usurious debt, was void.[3] But in a later case, where a deed of trust was given for the security of several debts due to different individuals, some of which were *bona fide* and some tainted with usury, the deed was

[1] 7 Paige, 615, 617, 641.

[2] 9 N. Y. 73; Livermore v. Northrup, 44 N. Y. 167; Busby v. Firm, 1 Ohio St. 409.

[3] Shober v. Hauser, 4 Dev. & Batt. 91.

held to be valid as to the former, though void as to the latter, there being no connection between them.[1]

In Alabama, the validity of a deed of trust is not affected by the fact that one of the items of which the debt secured is composed, consisted of usurious interest which the creditor had in good faith been compelled to pay to a third person, for the purpose of replacing money that the grantor had borrowed from him and failed to return.[2] In Virginia, where a deed of trust was made to secure a usurious debt, and the debt was afterwards freed from its usurious character, and it was agreed that the deed should stand as security for it, the deed was sustained.[3]

§ 119. *Other Cases.*—In a case in New York, where money belonging to a wife had come into the hands of her husband previous to the married woman's act, and which he agreed to hold as a loan, it was held that equity would permit him to pay the loan under an assignment, and for that purpose to prefer her.[4] A similar doctrine prevails in Illinois.[5] Provision may also be made for the payment of a mortgage for the purpose of restoring her inchoate right of dower in the mortgaged premises discharged of the mortgage.[6]

In Pennsylvania, a wife can prove her claim against the assigned estate of her husband, like any other creditor, it appearing that her claim was *bona fide* and upon good consideration.[7]

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[1] Brannock v. Brannock, 10 Ired. L. 428; and see Roane v. Bank of Nashville, 1 Head (Tenn.), 526.

[2] Pennington v. Woodall, 17 Ala. 685. [3] Martin v. Hall, 9 Gratt. 8.

[4] McCartney v. Welch, 44 Barb. 271; affirmed 51 N. Y. 626; Woodworth v. Sweet, 44 Barb. 268.

[5] Tomlinson v. Matthews, 98 Ill. 178.

[6] Dimon v. Delmonico, 35 Barb. 554.

[7] Zeigler's Appeal, 84 Penn. St. 342.

CHAPTER VIII.

FORM OF THE ASSIGNMENT.

§ 120. There are two principal modes in which a debtor not having the means of paying his liabilities in money, may make provision for creditors by the transfer and appropriation of property. He may adopt the course of making *special* transfers of specific portions of property, from time to time, as circumstances may require, or he may make one *general* transfer embracing the whole. The former course is usually pursued where the creditors are few, or the indebtedness limited, not amounting to insolvency or involving the necessity of suspension of business. The latter is the method commonly resorted to by insolvent debtors.

§ 121. *Special Assignments.*—Again, provision by *special* or separate transfers may be either absolutely in *payment* and satisfaction of the debt provided for, or by way of *security*. Of the forms of security a very common one is by mortgage; another is by assignment directly to the creditor, and having the operation of a mortgage;[1] a third is by special deed of trust, which in many respects resembles a mortgage—the conveyance to the creditor, which is direct, being accompanied by a declaration of trust, expressing the particular mode and time of appropriating the assigned property, in case the debt so secured is not sooner paid;[2] a fourth is by deed of trust to a trustee for the creditor, which also is frequently treated as a mortgage.[3]

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[1] See Leitch v. Hollister, 4 N. Y. 211. According to Mr. Justice Story, an assignment directly to a particular creditor, for the payment of his own debts, or as a security or discharge of his own liabilities, is not properly an assignment "for the benefit of creditors." United States v. McLellan, 3 Sumn. 345, 354, 355. See the observations of Redfield, C. J., in Mussey v. Noyes, 26 Vt. 462, 471.

[2] See *ante*, p. 15.

[3] See Stimpson v. Fries, 2 Jones' Eq. 156.

The appropriation of a debtor's *whole* property in payment of his debts, may be either by *separate* transfers to each of the creditors provided for,[1] or by one *general* transfer of the whole, for their common benefit. Where the latter form is adopted (which is most usual), it may be *directly* to the creditors themselves, without the intervention of a trustee. But the most common form of general transfer, and the one best known in the mercantile community, is a conveyance of the debtor's whole property to one or more *trustees* or assignees, whether creditors or strangers, for the benefit of the creditors provided for.[2] This is the description of conveyance which the term *voluntary assignment* has been held to import,[3] and will receive a principal share of attention in the present work. The most prominent features of these general transfers will now be noticed.

§ 122. *General Assignments.*—A general assignment in trust for the benefit of creditors is understood to import a conveyance of *all* the debtor's property,[4] as distinguished

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[1] "If transferring every part of his property, separately, to individual creditors, in payment of their several debts, would be not only fair but laudable, it cannot be fraudulent to transfer the whole to trustees for the benefit of all." Marshall, C. J., in Brashear v. West, 7 Pet. 608, 614.

[2] In the case of Cunningham v. Freeborn, in the Court of Errors of New York (11 Wend. 241, 256), Mr. Justice Nelson expressed strong disapprobation of the principle of assignments to *a trustee*, and declaring his preference for assignments *directly* to the creditors themselves; leaving them to act, either each as his own trustee, or, if this were inconvenient, to appoint a trustee in their place. See also the observations of Redfield, C. J., in Mussey v. Noyes, 26 Vt. 462, 471. See *ante*, p. 7.

[3] Walworth, C., in Dias v. Bouchaud, 10 Paige, 445, 448, 461; *ante*, § 3.

[4] Thompson, J., in United States v. Clark, 1 Paine, 629, 640. We have seen that the term *assignment*, in its application to real estate, implies of itself, and without any words of qualification or description, a transfer of the assignor's *whole* interest in the subject of assignment. See *ante*, p. 1. In mercantile language, the term is daily used in the same broad sense. When it is said of a merchant, that he has "made *an assignment*," it is understood, not that he has made a transfer of some specific article, or portion of property, to this or that particular creditor, in payment or as security; but that he has made a *general* disposition of his property, and suspended his whole business in consequence. In the case of the United States v. Mott (1 Paine, 188, 195), the term "voluntary assignment" was considered to mean an assignment of all the debtor's property. In the Vermont case of Mussey v. Noyes, (26 Vt. 462, 473), it was remarked by the chief justice, that an assignment which includes all one's attachable

from a *partial* assignment, the nature of which will be considered in the next chapter. An exception of a trifling amount, whether by accident or design, will not alter the character of the conveyance in this respect.[1]

A general assignment is also understood to import a provision for a considerable number of creditors, or at least for *several*, or more than one. An assignment of a debtor's property in trust for the benefit of *one* creditor was lately held, in New York, not to be a voluntary assignment for the benefit of creditors, within the meaning of the act of Congress of March 2, 1799, creating a priority of payment in favor of the United States.[2]

The transfer by a debtor of all his property does not of itself make what is termed a *general* assignment, but it must also be conveyed to trustees to be held by them *in trust* for other creditors;[3] and if the trust is not declared in the instrument itself, it may arise by implication from the charac-

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property, and which is intended to close up one's business, and does so at once, is clearly a general assignment. See also Bishop v. Hart's Trustees, 28 Vt. 71.

[1] United States v. Hooe, 3 Cranch, 73, 91; United States v. Clark, 1 Paine, 629; see United States v. Bank of the United States, 8 Rob. (La.) 262; and see the Vermont cases of Mussey v. Noyes, 26 Vt. 462; Noyes v. Hickok, 27 Id. 36; and Bishop v. Hart's Trustees, 28 Id. 71. In the case of United States v. Clark, (1 Paine, 629), where a debt amounting to $7,400 had been omitted in the statement of the assignor's property, the assignment was held to be general. Krug v. McGilliard, 76 Ind. 28; Du Bose v. Carlisle, 51 Ala. 590.

[2] Bouchaud v. Dias, 1 N. Y. 201. In the Vermont case of Mussey v. Noyes, it was remarked by Redfield, C. J., in delivering the opinion of the court, that "the term *general*, as applied to assignments, does not have reference, probably, so much to the proportion of creditors, as to the proportion of property." 26 Vt. 472. After referring to the present work, the learned chief justice adds, "We may conclude, then, that if a majority of the creditors are provided for, and all the property is assigned, the assignment is still general." Id. 473. In the southern States, general assignments are characterized as being absolute conveyances of the debtor's property, in contradistinction from mere deeds of trust, which are intended as security for particular debts, or to protect particular individuals, and which reserve to the grantor the right of redeeming the property by a given time. See the observations of Dargan, C. J., in Johnson v. Thweatt (18 Ala. 741, 746), and of Chilton, C. J., in Shearer v. Loftin, 26 Id. 710, 714.

[3] Isham, J., in Peck v. Merrill, 26 Vt. 696; see Noyes v. Hickok, 27 Vt. 36; Bishop v. Hart's Trustees, 28 Vt. 71. See Robbins v. Magee, 76 Ind. 381, where a conveyance was held to be a composition agreement rather than an assignment.

It would seem that there should be in a general assignment: (1) a transfer of the debtor's property; (2) a trust created; (3) for the purpose of paying debts; (4) full power given to sell any or all of the property, to fully execute the trust reposed in the assignees. Ginther v. Richmond, 18 Hun, 232. See *ante*, § 3.

ter of the transaction.[1] Thus, in those States[2] in which fraudulent conveyances made by an insolvent debtor, inure by statute to the equal benefit of all his creditors, and operate as a voluntary assignment, the trust is declared by statute, and the court carries it into effect by the appointment of a trustee.

A general assignment may consist of several separate transfers, if constituting one transaction, or having one and the same general object.[3] But, ordinarily, such assignments are effected by a single transfer, and expressed by a single instrument of conveyance.

§ 123. *Parties to the Instrument—Assignors.*—Where an assignment is made by several persons jointly indebted as partners, they are all, of course, named in the instrument as assignors.

In some of the States, as Pennsylvania,[4] Virginia,[5] and Maryland,[6] where real estate is conveyed by assignment, the wives of the assignors are made parties to the deed; and it has been held in the first State, that a voluntary assignment for the benefit of creditors, by the husband alone, and the subsequent sale and conveyance by his assignees, does not divest the wife's right of dower in the lands assigned.[7] In New York, the wife's dower is conveyed by her joining with the husband in a separate deed of the land in the ordinary form, such deed bearing even date with the assignment, and accompanying it.[8]

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[1] Burrows v. Lehndorff, 8 Iowa, 96.

[2] Rev. Stat. of Ohio (S. & C.), p. 718; R. S. (1880), § 6344; Gen. Stat. of Ky. (ed. 1873), vol. I, p. 490.

[3] See § 128.

[4] See Hennessy v. The Western Bank, 6 Watts & Serg. 300.

[5] See Reynolds v. The Bank of Virginia, 6 Gratt. 174.

[6] Schumann v. Peddicord, 50 Md. 560; Reiff v. Horst, 55 Id. 42; Reiff v. Eshleman, 52 Id. 582.

[7] Helfrich v. Obermyer, 15 Penn. St. 118; see Caldwell v. Bruggerman, 4 Minn. 270.

[8] See Darling v. Rogers (22 Wend. 483), in which there were five of these separate and accompanying deeds.

§ 124. *Assignees.*—Where the assignment is to a trustee for the benefit of creditors, it is usual to make the assignee or trustee a formal party to the deed of assignment; and this is necessary where it is intended that the instrument shall contain an express provision for its execution by the assignee, or any covenant to be performed by him. But it has been held that where the assignment contained no such provision or covenant, it was not necessary that the assignee should become a party to it by signing.[1]

Where the assignee is not thus made a party, the assignment may be drawn in the first person, in the form of a deed-poll. Where, however, he is made a formal party, the instrument is drawn in the form of an indenture of two parts, technically called an *indenture bipartite.*

§ 125. *Creditors.*—Besides the assignee or assignees, it is sometimes the practice to make the creditors themselves, for whose benefit it is intended, parties to the assignment. In general, this is not necessary,[2] nor is it usual, unless there is something in the assignment to which it is desirable to obtain the express written assent of the creditors, so as to bind them to its provisions; as where the assignor stipulates for a release, or some other advantage to himself, to which he would not otherwise be entitled. It appears to be a settled rule in our law, on this subject, that assignments *directly* to creditors are not valid without their assent; but that assignments to *trustees* for their benefit do not require such assent to render them valid and operative.[3] In the United States,

[1] Flint v. Clinton Co. 12 N. H. 430; see further, as to the execution of the assignment by the assignee, *post*, Chap. XVI.

[2] By the established principles of law, as held by eminent authority in this country, it is not necessary to the creation of any trust by deed, in favor of any persons, that the person for whose benefit the trust is created, should be a party to it. Story, J., in Halsey v. Whitney, 4 Mason, 206, 214; Layson v. Rowan, 7 Rob. (La.) 1. And courts of equity generally will compel the execution of a trust for creditors, though they be not at the time assenting, and parties to the conveyance. Halsey v. Whitney, *ubi supra;* Nicoll v. Mumford, 4 Johns. Ch. 522, 529, 530; Brooks v. Marbury, 11 Wheat. 78; Gray v. Hill, 10 Serg. & R. 436; Kinnard v. Thompson, 12 Ala. 487; Smith v. Turrentine, 8 Ired. Eq. 185.

[3] Nicoll v. Mumford, 4 Johns. Ch. 522; Ward v. Lewis, 4 Pick. 518; Pingree v. Comstock, 18 Id. 46; Weir v. Tannehille, 2 Yerger, 57; Robertson v. Sublett,

a common form of assignment (if not the prevailing form), is that of two parts, executed between the debtor or assignor of the one part, and the assignee or trustee of the other part, without any creditor becoming a party; and such an assignment, on its acceptance by the assignee, is held to be valid and effectual as a provision for creditors, creating a trust for them which they can enforce in the proper courts, and is irrevocable by the assignor.[1] A different rule prevails in England, and hence has arisen a material distinction between the forms of assignment in use in the two countries, in regard to their legal qualities and effect as modes of provision for creditors.[2]

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6 Humph. 313; Ingram v. Kirkpatrick, 6 Ired. Eq. 462; Stimpson v. Fries, 2 Jones' Eq. 156; Jones v. Dougherty, 10 Ga. 273; Bellamy v. Bellamy's Adm'r, 6 Fla. 62; Hall v. Dennison, 17 Vt. 310; 2 Kent's Com. [533] 691; Brown v. Chamberlain, 9 Fla. 464; Forbes v. Scannell, 13 Cal. 242; see *post*, Chap. XX.

[1] In Fellows v. Greenleaf (43 N. H. 421), it is said that an assignment not only does not need to contain, but should not contain, any provision for the creditors to sign it, or become parties to it, because if it is properly drawn and executed between the debtor and assignee, the assent of the creditors will be presumed; and if not so, it will be void as well as to those who have assented to it as to those who have not. See Stimpson v. Fries, 2 Jones' Eq. (N. Ca.) 156; 2 Kent's Com. [533] 692, n. See the subject more fully considered, and the principal cases cited, in Chap. XIV; see Gibson v. Rees, 50 Ill. 383.

[2] Assignments to which no creditor is a party, are in England called *deeds of agency*, or voluntary deeds of agency, the nature and operation of which are thus explained by Rolfe, V. C., in the case of McKinnon v. Stuart, 20 L. J. (N. S.) Chan. 49: "The doctrine of this court, as to mere deeds of agency, is perfectly simple and intelligible. It is competent to any one to make another his agent or attorney, to get in his property and apply it in payment of his debts, or in any other mode he may direct. And after he has done so, he may, at his pleasure, *revoke* the authority so given, and direct any other disposition of his property which he may prefer. What was really decided in Garrard v. Lord Lauderdale, and other cases involving the same point, was only this: that, in such a case, the conveyance of property to the agent, makes no difference as to the right of revocation in the debtor. The party in whom the property has been vested is a mere trustee for the debtor by whom it has been conveyed to him. He is still the mere agent or attorney, or in the nature of an agent or attorney of the debtor, and must obey his directions as to the disposal of the property. On the other hand, it is abundantly clear on the authorities, that where a creditor is a party to a deed whereby his debtor conveys property to a trustee, to be applied in liquidation of the debt due to that creditor, the deed is, as to the creditor, irrevocable. A valid trust is created in his favor, and the relation between the debtor and trustee is no longer that of mere principal and agent. Of course, that which is true where a single creditor is the *cestui que trust*, is at least equally so where there are many creditors. Nor does the creditor executing the deed become less a *cestui que trust* because he gives nothing to the debtor as a consideration for the trust created in his favor, or because it was the voluntary, unsolicited act of the debtor, to create the trust. I never knew that any question had been raised on this subject, as against creditors who had executed the deed, and so made themselves *cestuis que trust*. Where they have not executed the deed, questions have often arisen how

In some of the States assignments have been required, by statute, to be so drawn as to enable the creditors to become parties to them, if they choose, otherwise they were invalid as against creditors not parties. This was the case in Massachusetts, under the statute of 1836, c. 238;[1] although, even before this statute, it was considered necessary in that State that the creditors should be parties.[2] This was in conformity with the English rule and practice, already referred to. In Maine all assignments are required to provide for a proportional distribution of the debtor's estate among all his creditors becoming parties thereto; and three months from the execution of the deed are allowed the creditors to

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far, by having been apprised of its execution, and so, perhaps, been induced to do or abstain from doing something which may affect their interests, they may not have acquired the rights of *cestuis que trust*. This is the question referred to by Sir John Leach, in Acton v. Woodgate (2 Myl. & K. 492), and by Sir E. Sugden, in Brown v. Cavendish (1 J. & L. 606). But where, as in the present case, the creditors have actually executed the deed, I apprehend there is no longer any possibility of treating it as a mere voluntary deed of agency, revocable by the debtor."

In the later case of Siggers v. Evans (32 Eng. L. & Eq. 139), it was decided that the doctrine that a conveyance of property to trustees, in favor of creditors, operates as a mere power in the hands of mandataries or agents, revocable until communicated to or assented to by the creditors, does not apply where the trustee himself takes a beneficial interest under the deed. And according to the same case, it seems that where a deed of assignment has been executed to a stranger as trustee for creditors, a communication of the trust to a creditor, by reason of which he may not have pursued his remedy, or his position may have been altered, will render the deed irrevocable by the assignor, without any actual assent by any creditor. In Smith v. Hurst (22 L. J. [N. S.] Chan. 286; s c. 15 Eng. L. & Eq. 520), it was held that a deed of arrangement between a debtor and one of his creditors, conveying all the property of the debtor to the creditor, and which deed the debtor has power to revoke and alter at any time, and attempts to use as a shield to protect himself against the claims of his other creditors, is fraudulent and void against creditors whose interests are affected by the deed, notwithstanding the deed, upon the face of it, purports to be for the benefit of all the creditors. Such a deed is, in truth, a deed for the benefit of the debtor; and if a creditor accepts it, he takes it not for his own benefit, but for the purpose of carrying out the views and objects of the debtor, in fraud of the other creditors.

[1] "No assignment or conveyance made by any insolvent debtor to assignees or trustees, for the use of any of his creditors, shall be valid and effectual against an attachment or execution, in behalf of any creditor who is not a party to it, unless it is so made as to allow all the creditors of the debtor to become parties to it, if they see fit." Statutes of 1836, c. 238, § 11. This statute has been repealed by that of May 18, 1856. As to the present law of Massachusetts, see *ante*, p. 32.

[2] Parsons, C. J., in Widgery v. Haskell, 5 Mass. 144; and in Stevens v. Bell, 6 Id. 339; see, also, the opinion of Shaw, C. J., in Edwards v. Mitchell, 1 Gray, 239, 240, 241; May v. Wannemacker, 111 Mass. 102; Pierce v. O'Brien, 129 Id. 314.

become parties.[1] In New York, it has been expressly held to be not necessary that the creditors should be parties;[2] and the same has been held in Missouri, if the assignment contains no provisions prejudicial to their interests;[3] otherwise, it is of no avail until executed by them.[4]

Assignments are also sometimes expressly made for the benefit of such creditors as shall become parties to them, without reference to the requirements of any statute. In these cases it is, of course, necessary for the creditors to become parties, in order to obtain the benefit of the assignment.

Creditors may become parties to an assignment in other ways than by actually signing the instrument; as by coming in under it and filing their claims, for the purpose of obtaining a dividend.[5]

The effect of thus becoming parties will be considered hereafter.[6]

§ 126. *Writing, when Necessary.*—In considering how an assignment should be made, the necessity of *writing* to its validity occurs as a preliminary and most important inquiry.[7] *Special* or particular assignments are usually evidenced by some written instrument, more or less formal in its character; and in many cases a writing is expressly required by law to give them validity. In other cases, how-

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[1] Revised Statutes (ed. 1871), p. 543, § 4. It had been previously decided in that State, that if no creditor became a party, the assignment, though executed by the assignor and assignee, was invalid as against an attachment of the property assigned as the property of the debtor. Carr v. Dole, 18 Me. 358; Whitney v. Kelley, 67 Me. 377.

[2] Cunningham v. Freeborn, 11 Wend. 240. So in Vermont. Hall v. Denison, 17 Vt. 310.

[3] Duval v. Raisin, 7 Mo. 440.

[4] Drake v. Rogers, 6 Mo. 317; Swearingen v. Slicer, 5 Id. 240; but see Gale v. Mensing, 20 Mo. 461.

[5] See Bodley v. Goodrich, 7 How. 276. [6] See *post*, Chap. XLII.

[7] An assignment, it is said, does not necessarily imply or require writing; and when alleged of any subject, it should always be construed in connection with the law of transfer applicable to that particular subject-matter. Hutchings v. Low, 1 Green (N. J.), 246. Assignments are very generally made in writing, but they are by no means exclusively so made. Scott, J., in Edison v. Frazier, 4 Eng. (Ark.) 220, 221; and see further, as to the import of the term, *ante*, p. 3, n. 1.

ever, a mere delivery of the subject assigned is sufficient to pass the property; and in equity many assignments are held good which are not evidenced by any writing.[1]

In regard to *general* assignments, or those usually executed by insolvent debtors, a stricter rule prevails, and a writing of some kind is generally required, not only as a security against fraud and collusion, but as a necessary means of giving effect to the assignments themselves. The very nature of the transfer, especially when in the form of a trust, comprehending various descriptions of property, and accompanied by directions more or less numerous and complicated, as to the mode of distribution, renders a written instrument important.[2] Where *real* property is either wholly or in part the subject of the assignment, a writing is expressly required by statute. The provision of the English statute of frauds, requiring a writing signed by the party to give effect to transfers of estates or interests in lands, includes *assignments* as well as other conveyances;[3] and this is said to have been either expressly adopted, or assumed as law throughout the

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[1] See *ante*, p. 3. In Boyden v. Moore (11 Pick. 362), where a debtor delivered certain chattels to a creditor, saying, "Take the property, do the best you can with it, pay yourself, and pay the rest to my creditors," it was considered by the court as an assignment, and sustained in favor of the assignee. In Loftin v. Lyon (22 Ala. 540), a debtor had delivered to his creditor a quantity of cotton, to be sold, and the proceeds appropriated, first, to the payment of his own debt, and the balance to be paid to other creditors named, in extinguishment of their debts; and see Higginbottom v. Peyton, 3 Rich. Eq. 398; Gordon v. Green, 10 Ga. 534; Lockwood v. Canfield, 20 Ill. 126; Newby v. Hill, 2 Metc. (Ky.) 530. In the case of Foster v. Lowell (4 Mass. 308), an assignment of a very simple character—being an agreement by the debtor that a third person having money belonging to him in his hands, should retain it for the use of a particular creditor—was held void, on the ground of its not being reduced to writing. But see the reporter's note to the case.

[2] Hertle v. McDonald, 2 Md. Ch. Dec. 128; but see Dale v. Olmstead, 36 Ill. 150.

[3] All estates and interests in lands (except leases not exceeding three years) created, granted or *assigned*, by livery and seizin only, or by parol, and not in writing, and signed by the party, were declared to have no greater force or effect than estates at will only. Stat. 19 Car. II. c. 3, §§ 1, 2; 4 Kent's Com. [450] 491.

A verbal assignment of both real and personal property is invalid. Such an attempted transfer of real estate alone would of course be in violation of the Statute of Frauds; and where the agreement includes both real and personal property it will be regarded as entire, and come within the statute. Lill v. Brant, 6 Ill. App. (Bradw.) 366.

United States.[1] In New York it is made to apply not only to every estate and interest in land, but to every trust or power concerning the same,[2] and to every grant or assignment of any trust.[3] And in most of the States, both assignments of interest in lands, and declarations or creations of trust in lands, are expressly required to be in writing.[4]

In many of the States, it is expressly required by statute that an assignment for the benefit of creditors should be in writing, and further formalities are in some instances prescribed. Thus, in Connecticut[5] and Minnesota,[6] transfers, unless so made, will be void. And in New York,[7] a writing is required, and this direction of the statute has been held to be mandatory, and a failure to comply with it will render the assignment invalid.[8] And in Indiana,[9] a general assignment must be made by indenture, containing a full description of all the real estate assigned and accompanied by a schedule containing a particular enumeration and description of all the personal property assigned; similarly in Oregon.[10]

§ 127. *Form of Assignment.*—In regard to the particu-

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[1] Kent's Com. *ubi supra.*

[2] 3 Rev. Stat. (7th ed.) 2326, § 6.

[3] Rev. Stat. [137] 145, § 2.

[4] See Rev. Stat. of Me. (ed. 1871), p. 560, c. 73, § 11; Rev. Stat. of N. H. (ed. 1867), p. 252, tit. 15, c. 121, §§ 12, 13; Gen. Laws of N. H. (ed. 1878), p. 324; Rev. Stat. of Vt. (ed. 1862), p. 450, tit. 19, § 21; Rev. Laws of Vt. (1880), §§ 1932, 1933; Rev. Stat. of Mass. (ed. 1860), p. 502, c. 100, §§ 19, 20; Pub. Stat. of Mass. (1882), p. 792; Rev. Stat. of N. J. (ed. 1874), p. 508, tit. 17, c. 1, §§ 10, 11; Rev. of N. J. (1878), p. 444; Purdon's Dig. (Brightley), vol. I, p. 724, § 3; Swan's Stat. of Ohio (ed. 1841), p. 423, c. 52, § 4: R. S. of Ohio (1880), § 4998; Rev. Stat. of Ind. (ed. 1870), vol. I, p. 651, §§ 1, 2, 3; ed. 1881 (Hurd), p. 559, c. 59, § 9; Rev. Stat. of Ill. (ed. 1874), p. 541, c. 59, § 9; R. S. of Ill. (1881), p. 742; Com. Law of Mich. (ed. 1871), pp. 1455, 1456; Rev. Stat. of Wis. (ed. 1871), p. 1254; R. S. of Wis. (1878), § 2302; Stat. of Ga. (Prince's Dig.) 915; Civil Code of La. art. 2415; Civil Code of Cal. (Hittell), § 5852. In Texas it is not made necessary by the statute of frauds that an agreement creating a trust should be in writing. James v. Fulerod, 5 Tex. 512.

[5] Gen. Stat. of Conn. (Rev. 1875), p. 378; see Whitaker v. Gart, 18 Conn. 522; and as to trusts, see Beers v. Lyon, 21 Conn. 604; Hawey v. Mix, 24 Conn. 406.

[6] Laws of 1876, c. 44; Stat. of Minn. (1878), p. 544. Previously assignments of personal property accompanied with delivery were not required to be in writing. Conrad v. Marcotte, 23 Minn. 55; but see Hoopes v. Knell, 31 Md. 550.

[7] Laws of 1877, c. 466, § 2; 3 Rev. Stat. (7th ed.) p. 2276.

[8] Hardman v. Bowen, 39 N. Y. 196; Britton v. Lorenz, 45 N. Y. 51; s. c. 3 Daly, 23; Kercheis v. Schloss, 49 How. Pr. 284.

[9] Stat. of Ind. (Rev. 1876), vol. I, p. 142.

[10] Laws of 1878, p. 37.

lar character of the writing by which an assignment is required to be evidenced, it may be observed that it partakes usually of the character of a *deed*, and is drawn with the same care as any other instrument of conveyance; consisting of two principal parts—a *transfer* to the assignee which vests in him the property, and a declaration of *trust* which directs him how to dispose of it.[1] In some cases, however, very informal writings have been pronounced sufficient as assignments.[2] Thus, where a debtor inclosed notes to one of his creditors by letter, with directions, first, to satisfy his own debt, and then those of other creditors designated by him, it was held, in South Carolina, that this was a good assignment, as against other attaching creditors, for the benefit of the creditors named.[3] So, a power of attorney to collect certain moneys and pay them to certain creditors in a prescribed order of preference, has been held in Pennsylvania to be virtually an assignment.[4]

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[1] Sometimes, instead of combining the declaration of trust in the same instrument with the conveyance of the property, the property is conveyed absolutely by deed in the ordinary way, and the declaration of trust expressed by a separate instrument. This was the form in the cases of Schuylkill Bank v. Reigart, and Reigart's Appeal (4 Barr, 477); and in Johnson v. Whitwell (7 Pick. 71). But this is not usual.

[2] Page v. Weymouth, 47 Me. 388.

[3] Shubar v. Winding, 1 Cheves' L. 218. The letter in this case contained, in fact, the elements of a conveyance in trust to pay debts. The assignment in Hall v. Marston (17 Mass. 575), was of the same simple character. Directions to pay money already in hand, present a still simpler form of the class termed *equitable* assignments, being resolvable into a mere declaration of trust. But these have no necessary connection with insolvency, and rather belong to the head of *special* assignments.

So in the case of Brown v. Chamberlain (9 Fla. 464), where a debtor without any writing whatever, but verbally and by word of mouth only, assigned, transferred and delivered to three of his creditors, composing a firm, a package containing notes, drafts, &c., for nearly $30,000, in trust to collect and distribute the proceeds as far as they would go *pro rata* between the assignees and his other "Charleston creditors," this was held to be a voluntary assignment.

[4] Watson v. Bagaley, 12 Penn. St. 164. But a revocable power of attorney, without any trust for creditors, was held by the same court not an assignment for the benefit of creditors. Beans v. Bullitt, 57 Penn. St. 221; and see Kalkman v. McElderry, 16 Md. 57. But in Britton v. Lorenz (45 N. Y. 51), a bill of sale absolute on its face, was shown by parol to be executed in trust for the benefit of creditors, and was declared invalid as such because not acknowledged in compliance with the statute. See Truit v. Caldwell, 8 Minn. 364; see Matter of Oakley, 2 Edw. Ch. 478. In the North Carolina case of Stimpson v. Fries (2 Jones' Eq. 156), one of the trust deeds was very loosely drawn, having the form and a good deal of the language of a power of attorney, the debtor appointing

In this case, Chief Justice Gibson remarked that "an assignment of a chose in action or of a fund, need not be by any particular form of words, or particular form of instrument. * * * Any binding appropriation of it to a particular use, by any writing whatever, is an assignment, or what is the same, a transfer of the ownership."[1] In a California case, where the assignment was in the form of a declaration made before the American consul at Canton, China, and signed and acknowledged by the assignor, it was sustained as valid.[2] But a *judgment* given to prefer a particular creditor has been held, in Pennsylvania, to be not an assignment in substance or in form.[3] And it has been further held, in the same State, that the confession of a judgment by a debtor to a trustee for the payment of certain specified creditors, is not an assignment for the benefit of creditors, and does not require to be recorded, as required of assignments by the law of that State.[4] It would seem, however, that a

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the trustee his general agent and attorney, to sell and dispose of all of his estate, real and personal, and to pay and satisfy the debts, &c. But it contained an express consideration of ten dollars, and concluded with a clause of express transfer to the trustee, of all the debtor's property, for the purposes mentioned. On these grounds, the court held it to be more than a mere power of attorney, and that it contained sufficient words of conveyance to vest the fee simple and absolute estate in the trustee. But in a New Jersey case, where a debtor, in compliance with the request of some of his creditors, placed, by assignment, the books of account, notes, &c., of a dissolved firm in the hands of a responsible person to collect, and for no other purpose, such an assignment was held to be nothing more than a power of attorney, which did not place the property beyond the control of the debtor, and created no rights between the assignee and the creditors. Brown v. Holcomb, 1 Stock. 297.

[1] No particular form of words is necessary to create a trust. Gordon v. Green, 10 Ga. 534. Where a person being largely indebted, executed to an attorney for some of his creditors, an assignment of numerous claims and judgments "in payment" of their demands, the transaction was held to be an assignment for the benefit of creditors. Wallace v. Wainwright, 87 Penn. St. 268, and see the discussion of cases upon irregular assignments in the opinion by Woodward, J. In Corn Exchange Nat. Bank v. Philadelphia Trust, &c. Co. (11 Phila. 510), it is held that where the effect of an instrument is to transfer property beyond the reach of an execution, in trust for the benefit of assenting creditors, it is within the purview of the statutes regulating voluntary assignments for creditors.

[2] Forbes v. Scannell, 13 Cal. 242.

[3] Blakey's Appeal, 7 Barr, 449; see Worman v. Wolfersberger's Ex'rs, 19 Penn. St. 59; see Lansing v. Woodworth, 1 Sandf. Ch. 43, 45.

[4] Guy v. McIlree, 26 Penn. St. 92. "There is little if any similarity," observes Knox, J., in this case, "between an assignment and a judgment. The one is an absolute transfer of its subject-matter, whilst the other is but the means whereby to enforce the payment of a debt. An assignment passes the property

judgment may be confessed in favor of the creditors at large, so as to operate as a general assignment.[1]

So in the case of Lucas v. The Sunbury & Erie R. R. Co.,[2] a lease reserving a portion of the rent for the payment of the lessor's debts was held to be an assignment for the benefit of creditors. Mr. Justice Hare said: "The means employed in each particular instance would have seemed to me immaterial if the result were a transfer in trust, or a trust bottomed on a transfer; if, in short, the property ceased to be the debtor's without vesting directly and absolutely in his creditors, and remained outstanding in the hands of a third person who could not be compelled to render an account or to fulfil the duties imposed upon him without a recourse to the aid of equity." And this language is referred to with approval by Mr. Justice Read in the same case on appeal.[3]

§ 128. *Assignment by Several Instruments.*—A general assignment, though usually made by one deed or instrument, may be made as effectually by *several* instruments, relating to the same subject-matter.[4] Thus, in Inglis v. Grant,[5] there were two deeds. The first was of three parts, between the debtor, the trustee, and certain creditors, by which the latter covenanted that, if the debtor would assign to the trustee all his effects to pay creditors in a certain order, they would release him. The second deed was an assignment to the trustee, made pursuant to the foregoing. In Johnson v. Whitwell,[6] the assignment was by two instruments—an

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in real and personal estate, rights and credits, whilst a judgment of itself gives no vested estate in any of the property of the defendant, merely creating a lien upon his real estate, if any he has, at the time of its entry." Id. 94.

[1] In Meux v. Howell (4 East, 1), the assignment was in the form of a judgment confessed to a creditor for a large sum, with a defeasance that execution should only issue for such an amount as should cover the debt of the creditor, and all the other creditors, among whom a ratable distribution was to be made. See Adams v. Woods, 8 Cal. 152.

[2] 32 Penn. St. 458; Bittenger v. R. R. Co. 40 Penn. St. 269.

[3] Lucas v. R. R. Co. *supra.*

[4] Norton v. Kearney, 10 Wis. 443; Burrows v. Lehndorff, 8 Iowa, 96; Van Vleet v. Slauson, 45 Barb. 317; Bridges v. Hindes, 16 Md. 101; Berry v. Cutts, 42 Me. 445; see Schoolfield v. Johnson, 11 Fed. Reptr. 297.

[5] 5 Term. R. 530.

[6] 7 Pick. 71.

absolute deed of conveyance, and an indenture of three parts declaring the trust. In Blank v. German,[1] there was, first, an agreement in writing by the debtor to convey the property subject to the payment of a mortgage, and also subject to a full release of certain debts; next, an agreement in writing by the creditors, that if the debtor would convey to two of their number for the use of the debts, they would release him; and, finally, a conveyance in the form of an ordinary deed by the debtor and his wife to the two creditors. These instruments were taken together as constituting an ordinary assignment to trustees for the use of creditors. In Mussey v. Noyes,[2] the assignment was in two parts, consisting of two principal deeds referring to each other, together with other papers, all relating to the same subject-matter, executed on the same day, and to effect the same general design. The court took them together, regarding them as one transaction. In French v. Townes,[3] two instruments had been executed by the debtor to a creditor, on the same day; one being a power of attorney for the particular benefit of the creditor; the other, a deed of trust to secure the creditors generally, with preferences. The court held that both papers were to be construed as one instrument. In Stimpson v. Fries,[4] there were three deeds of trust, separated by considerable intervals; one executed in the year 1848; another in 1854, of all the debtor's property to the same trustee; and a third in 1855, of the same property to another trustee. The court upheld and gave effect to all the three deeds as parts of a general provision for creditors.

Again, a general assignment may be made either by one instrument conveying the whole of the assignor's property, or by *several* instruments, conveying several portions re-

[1] 5 Watts & Serg. 36.

[2] 26 Vt. 468, 471. In the later case of Peck & Co. v. Merrill & Trustees (Id. 680, 691), there was an assignment by the debtor, and also several mortgages of real estate, executed by him about the same time. The court treated them as one instrument.

[3] 10 Gratt. 518.

[4] 2 Jones' Eq. 156.

spectively. In this way, several partial assignments, though in the form of distinct deeds, and executed at different periods, will be taken together as constituting one general assignment. Thus, in the case of Downing v. Kintzing,[1] there were two assignments made to different persons by an insolvent debtor, with an interval of thirty-one days between them, and together conveying the whole of the debtor's estate; the object being to evade the act of Congress giving a priority to the United States. It was contended that the two deeds were to be construed each by itself. But the court held the contrary, taking them to constitute but one general assignment, and so coming within the act. The same question arose in the late case of the United States v. The Bank of the United States,[2] where three partial assignments had been made by the bank, dated June 7th, and September 4th and 6th, 1841, respectively. The court below had held that all of these assignments should be considered as one, so as to give the United States their priority; and on appeal, the Supreme Court held that decision to be correct. The rule governing these cases was laid down by the counsel for the plaintiffs in the following terms, which seem to have met the approval of the court—that, no matter how many instruments are employed to effect the same result, they all partake of the same character, and all should be considered as parts of the same whole. If the same causes which led to the execution of one of the instruments, partial when considered alone, continue to operate until every particle of the debtor's property is divested, the first instrument is to be coupled with those that follow, and the whole should be construed together.[3]

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[1] 2 Serg. & R. 326, 335. In the case of Dance v. Seaman (11 Gratt. 778), there were two deeds, dated on the same day; one executed by one of two debtors, and the other by the other debtor, each conveying one moiety of the same property, with substantially the same provisions.

[2] 8 Rob. (La.) 262.

[3] Holt v. Bancroft, 30 Ala. 195; Burrows v. Lehndorff, 8 Iowa, 96; Van Vleet v. Slauson, 45 Barb. 317.

Where two conveyances operating as an assignment, were executed at the same time and between the same parties and relating to the same subject-matter,

§ 129. *Assignment by Single Instrument.*—But assignments in trust for the benefit of creditors are usually made by formal instruments having all the requisites of a deed. They may be drawn in either of the following varieties of form, viz.: first, by the debtor to the assignee, in the form of a *deed poll*, without making the latter a party;[1] secondly, between the debtor and the assignee, the latter being made a formal party, and this is called an assignment *bipartite*, or of two parts; and thirdly, between the assignor, assignee, and creditors, the latter being also made formal parties, and this is termed an indenture *tripartite*, or of three parts. The two last constitute the species of form in most general use. There is also a fourth variety, of *quadripartite* assignments, in which the parties are arranged in four parts;[2] but these are rarely adopted.

§ 130. *Simplest Form.*—The essential features of an instrument of assignment may be most conveniently illustrated by taking up the simplest variety in common use, which is the assignment bipartite, considering it as divested of all special clauses, and examining in succession its formal parts. These consist of the following: 1, the commencement; 2, the recital; 3, the consideration; 4, the transfer; 5, the description of the property assigned; 6, the *habendum;* 7, the declaration of the trusts or directions to the assignee; 8, the reservation to the assignor; 9, power of attorney to the as-

they should be construed together as forming parts of a single conveyance. The argument that the assignor had no interest to assign after having executed the recorded deed, was considered of no weight. Kruse v. Prindle, 8 Oregon, 158.

A defendant executed chattel mortgages for the benefit of certain creditors, and immediately thereafter, and on the same day, executed a deed of general assignment. It was held that the instruments being executed together, that was really but one transaction constituting a general assignment, which was invalidated by the preference. Van Patten v. Burr, 52 Iowa, 518.

A transfer, by verbal arrangement, of both real and personal property, to secure a surety, the real estate being afterward conveyed by warranty deed to the surety, is an assignment and not a mortgage. Lill v. Brant, 6 Ill. App. (Bradw.) 366.

[1] This appears to be the ordinary form in Connecticut, where assignments are required to conform to the statute. Strong v. Carrier, 17 Conn. 319; see Whittaker v. Williams, 20 Id. 98; but see the act of 1853, Rev. Stat. (ed. 1874), p. 378.

[2] This was the form of assignment in Foster v. Saco Manufacturing Company, 12 Pick. 451.

signee; 10, covenant by the assignee; and 11, the concluding clause. To the assignment are usually appended two *schedules*, which are marked and referred to in the body of the instrument, and are taken as a part of it—first, a schedule of the property assigned; and, secondly, a schedule of the assignor's creditors, or of the debts to which the property is to be appropriated. The forms in the appendix in this work may be consulted with advantage in connection with the following explanations.

§ 131. *Commencement and Recital.*—The date of the instrument and the names of the parties are first inserted.

The assignment next proceeds to recite the indebtedness of the assignor to his creditors in divers sums, which, by reason of losses, &c., he is unable to pay; and his agreement to transfer to assignees all his property in trust for their benefit. The indebtedness is usually stated in this part of the instrument in general terms, the particular debts being afterwards specified in a schedule. But sometimes, as where the creditors are few in number, the debts are described in the recital in lieu of a schedule. It is better that no language should be employed which can raise a question as to the fact of the assignor's insolvency.[1]

A false recital of losses as the occasion of the debtor's failure has been held not to affect the rights of creditors under an assignment.[2] Nor will a misdescription in the recital of debts described as the consideration of the assignment affect the validity of the deed.[3] And a trust deed to secure creditors, reciting the amount of the debts due to the different creditors, is not conclusive, even as against the grantor and his administrator, of the amount of the respective debts.[4]

It has sometimes been the practice to recite in this part

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[1] See Kellogg v. Slauson, 15 Barb. 56; Allen, J., Id. 57, 58; s. c. on appeal, 11 N. Y. 302; Parker, J., Id. 304, 305; Van Nest v. Yoe, 1 Sandf. Ch. 4.

[2] Reinhard v. Bank of Kentucky, 6 B. Mon. 252.

[3] Graham v. Lockhart, 8 Ala. 9.

[4] Griffin's Ex'r v. Macaulay's Adm'r, 7 Gratt. 476.

of the assignment, the reasons which led to the making of it, the object contemplated by it, and even the circumstances under which it was made.[1] This, while not strictly necessary, may in certain cases be hazardous, as the language of recitals is sometimes relied on to show a fraudulent intent on the part of the assignor, where the assignment is assailed on that ground.[2] In a case in New York, where the assignment was declared to be made for the purpose of carrying into effect the assignor's intention of "applying his property and estate to the payment of his debts, in a fair and equitable manner, and without *sacrifice*," it was held to be no evidence of an intent to hinder or delay creditors, although the terms used were admitted to be not happily selected.[3] In a case in Alabama, where a deed of trust recited that some of the grantor's creditors were urging the collection of their debts at a time when there was a great pressure in the money market, and that his property, if sold at a more favorable period, would be more than enough to pay off all his debts, it was held that this was but a statement of the reasons which induced him to make the deed, and did not render it fraudulent on its face.[4]

§ 132. *Consideration.*—Next follows the statement of the consideration of the assignment, which usually is—"of the premises, and of one dollar," or some nominal sum paid to the assignor; and of the covenants on the part of the assignee. It is always best to express the consideration on the face of the deed, although it will be held to import one.[5]

In deeds of trust, the amount of the debts intended to be secured is sometimes specifically recited as the considera-

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[1] See Brigham v. Tillinghast, 15 Barb. 618; Shackelford v. P. & M. Bank of Mobile, 22 Ala. 238.

[2] Ward v. Trotter, 3 Mon. 1; Vernon v. Morton, 8 Dana, 247.

[3] Brigham v. Tillinghast, 15 Barb. 618; Allen, J., Id. 620. The judgment in this case was afterwards reversed on another ground. 13 N. Y. 215.

[4] Shackelford v. P. & M. Bank of Mobile, 22 Ala. 238.

[5] See *post*, chap. XII.

tion. In such cases, the recital should correspond with the actual indebtedness. The recital of a fictitious consideration as the ground of the deed will be evidence of an intention to hinder and delay creditors.[1] In a case in Tennessee, a deed of trust purporting to be for a debt then due of $2,500, when only $304 were in fact due, was held to be upon a false and fictitious consideration, calculated to deceive creditors.[2]

§ 133. *Transfer.*—Next follows the clause of transfer, by which the assignor grants, bargains, conveys, assigns, transfers and sets over to the assignee, his heirs, executors, administrators and assigns, all his estate, real and personal, describing it by sufficient words.

§ 134. *Description of Property.*—The property intended to be assigned is described either in this part of the instrument, or in a schedule annexed, to which reference is here made; the latter being the usual method, where the property is considerable in amount, or consists of a variety of particulars. In either case, the description should be sufficiently explicit to enable the assignee to take possession.[3] A mere imperfection in the description will not, however, have the effect of invalidating the instrument, unless where there is a failure to comply with some express statute provision; and a description in general terms has frequently been held unobjectionable. Thus, in a case in Massachusetts, where the property assigned was described as the cargoes of certain vessels named, without invoices, bills of lading, or valuations; and real estate lying in Boston, Charlestown, and Maine,

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[1] Neuffer v. Pardue, 3 Sneed, 191, 194; Lockhard v. Browdie, 1 Tenn. Ch. (Cooper), 384.

[2] Neuffer v. Pardue, *supra*.

[3] In a case in Missouri, where the property assigned was described as "one bundle of orders, one bundle of fee bills, two bundles of notes, two bundles of accounts and one of receipts," it was held to be void for uncertainty. Crow v. Ruby, 5 Mo. 484; and in the case of the State v. Keeler, 49 Mo. 548, it was said, by Adams, J.: "It may be assumed as a proposition of universal acceptance that the absolute owner of property has the right to transfer the same by any description which, together with parol evidence, may ascertain the property conveyed." Clark v. Few, 62 Ala. 248; see note 3, p. 187; Walker v. Newlin, 22 Kans. 106.

without a particular description of each parcel—it was held that, as the description could be made certain by the references given, it was sufficient.[1] And in another case in the same State, where the property was described as "quantities of leather and stock, designed for the manufacture of boots and shoes, and also of boots and shoes already made or partly made," in the hands of divers persons named—this was held to be a sufficient specification of the property and the place where it was to be found.[2] And even a description of the real estate of the debtor, as "all his lands, tenements and hereditaments," was held, in a later case, sufficient to pass all his real estate without a more particular description.[3] But the words "all the goods, chattels and effects, and property of every kind, personal and mixed," do not include real estate. The words "personal and mixed" limit the assignment to the personal estate; nor can the assignee make any claim upon the proceeds after the sale and conversion of the realty by the assignor.[4] And where an assignment purported to be a conveyance of the various articles of property stated in a schedule annexed, but no schedule was in fact annexed at the time of the delivery of the assignment, it was held that even if the assignment at the time of delivery was invalid on account of uncertainty in the description of the property proposed to be assigned, the annexation of the schedule, with the consent of the parties, on the day after delivery, would cure the defect; or would be considered as equivalent to a redelivery as against a creditor attaching subsequently

[1] Hatch v. Smith, 5 Mass. 42.

[2] Emerson v. Knower, 8 Pick. 63; Parker, C. J., Id. 65.

[3] Pingree v. Comstock, 18 Pick. 46; Raynor v. Raynor, 21 Hun, 36. But in a late case in Florida, it was held to be essential to the conveyance of real estate that there be some description of the land. Bellamy v. Bellamy's Adm'r, 6 Fla. 62. So in the case of Ryerson v. Eldrid, 18 Mich. 12, a description of lands as follows: "14½ lots of land in Kankakee City, Kankakee Co., Illinois, valued at $5,400, and 2-7 of 1,600 acres of land in Green Co., Illinois, at $2,500, and 120 acres of land in Chickasaw Co., Iowa, valued at $600," was regarded as too uncertain and vague to make the assignment operate as a transfer of title, at least without clear evidence that the assignor owned certain lands in the places named, which might fall within the description, and that these were the only lands owned by him in such places. See Drakeley v. Deforest, 3 Conn. 272.

[4] Rhoads v. Blatt, 84 Penn. St. 31.

to such annexation.[1] So, in Connecticut, where a deed of assignment was made with a view to proceedings under the statute of 1828, against fraudulent conveyances, and was a part of such proceedings, the circumstance that it was general in its terms, embracing all the assignor's estate, real and personal (except such as was by law exempt from execution), without any specification or description of such estate, was held, in the absence of any other objection, not to render the assignment invalid.[2] And in another case in the same State, where the deed purported to assign to the trustees all the real and personal property of the assignors, of every description, in the State, except their household furniture, a schedule of which property was to be made out and annexed thereto as soon as convenient, it was held that such assignment was not invalid as against the assignors, either because the description of the property was too general, or because the schedule referred to was not then in existence.[3] In a case in New York, where the property assigned was described as "all and singular the goods and chattels, merchandise, bills, bonds, notes, book accounts, judgments, evidences of debt, and property of every name and nature whatever," without further specification, and without any inventory—it was held that such omission was not conclusive evidence of fraud, but only a circumstance to be considered by the jury in connection with the other circumstances of the case.[4] In Pennsylvania, where an assignment of personal property described it in a vague manner, it was held that a notice given by the assignees before the right of any third person had attached to the person in whose hands the property was, that it had been conveyed to them, and requesting him to hold it subject to their order, under which was written by the assignor,

[1] Clap v. Smith, 16 Pick. 247.

[2] Strong v. Carrier, 17 Conn. 319. The court, however, in this case, placed their decision on the ground that, by the provisions of the statute, two months were allowed for making an inventory after the deed was lodged for record. Church, J., Id. 330.

[3] Clarke v. Mix, 15 Conn. 152.

[4] Kellogg v. Slauson, 15 Barb. 56, 58, 59; affirmed on appeal, 11 N. Y. 302.

"I confirm the above," amounted to a declaration identifying the property.[1] In a case in Virginia, where the deed conveyed, among other things, cattle, household and kitchen furniture and debts, without specification either in the deed or by schedule accompanying it, it was held that the deed was not therefore fraudulent.[2] So in Alabama, it has been held that a deed of assignment is not void on account of an imperfect description of some of the chattels conveyed by it,[3] and that the omission to specify the property assigned does not render it fraudulent on its face, but is a circumstance merely to be weighed by a jury in determining the question of fraudulent intent.[4] In Mississippi, where, in an assignment by a bank, the property was described as "all the estate of the corporation, whether real, personal or mixed, and all the stock, goods, wares, merchandise, bills receivable, bonds, notes, book accounts, claims, demands, judgments, and choses in action," without any schedule,—it was held to be a sufficient general description of the property, to give precise information of its nature and extent, by reference and inquiry.[5] It seems that a less accurate description will be sufficient where a statute provides for the filing of a schedule or where the assignee had no difficulty in finding the property.[6] And in the case of Brashear v. West,[7] in the Supreme Court of the United States, an objection that the assignment was in general terms, and that no schedule was annexed, was overruled by the court. And even an erroneous description of the property assigned, will not prevent its passing to the assignee. Thus, where a party assigned his right to certain insurance money, describing it as then in the

[1] Passmore v. Eldridge, 12 Serg. & Rawle, 198.

[2] Kevan v. Branch, 1 Gratt. 274.

[3] Tarver v. Roffe, 7 Ala. 878; see Robinson v. Rapelye, 2 Stew. 86; Pope v. Brandon, Id. 401.

[4] Brown v. Lyon, 17 Ala. 659.

[5] Robins v. Embry, 1 Sm. & M. Ch. 207, 208, 273, 274.

[6] Lininger v. Raymond, 9 Neb. 40; Walker v. Newlin, 22 Kans. 106; see Farwell v. Gundry, 52 Wis. 268.

[7] 7 Pet. 608. 614; see Sadler v. Immel, 15 Nev. 219.

hands of a person named, when in fact it had not been paid to such person, the assignment was held to pass his right to the money.[1]

§ 135. *Amount Assigned—Reference to the Schedule.*— Where the assignment is intended as a general one, it should convey in terms, *all* the debtor's property of every kind, except such as may be exempted by law; and under this head particular reference should be had to the statute law of the State in which the assignment is drawn.[2] In Maine, all the debtor's property, not exempt by law, will be construed to pass, whether specified in the assignment or not.[3] In New Jersey, the inventory required by statute to be annexed to the assignment, is declared to be in no wise conclusive as to the quantum of the debtor's estate, but the assignees will be entitled to any other property which may belong to the debtor at the time of making the assignment, and comprehended within its general terms.[4] In New York an omission of assets from the schedule does not,[5] *ipso facto*, make the assignment void.

§ 136. Where it is intended to assign all the property, care should be taken not to restrict the description by words of reference to the schedule annexed, unless the schedule itself actually contains all. Thus, in the case of the United States v. Howland,[6] in the Supreme Court of the United States, where the property was described as "all and singular the estate and effects, which is contained in a schedule hereunto annexed, marked A," and the caption of the schedule was "Schedule of property assigned by [the debtors] to [the creditors],"—it was held by the court (Marshall, C. J.), that the deed conveyed only the property contained in the schedule; and the schedule did not purport to contain

[1] Sandford v. Conant, 2 Sandf. S. C. 143.

[2] See *ante*, Chap. VI.

[3] Act of March 2, 1844, c. 112. See Merrill v. Wilson, 29 Me. 58; Rev. Stat. (ed. 1871), p. 543.

[4] Rev. of N. J. (1878) p. 37; see Hayes v. Doane, 11 N. J. Eq. 84.

[5] Shultz v. Hoagland, 85 N. Y. 464. [6] 4 Wheat. 108.

all the property of the parties who made it; and that, in such a case, the presumption must be that there was property not contained in the deed, unless the contrary appeared. In accordance with this decision, it was held by Mr. Justice Story, in a case in the Circuit Court of Massachusetts,[1] where the assignment was of all a debtor's property in a schedule referred to, which enumerated only specific property, and did not purport to contain all—that no presumption arose that the property assigned was all the debtor's property, or that the assignment was a general one. So, in a late case in Maryland, where the assignment was of all the debtor's "goods, chattels, promissory notes, debts, wares, merchandise, securities and vouchers for, and effecting, &c., and property of every name and nature whatsoever of or belonging to him, and which are more particularly and fully enumerated in the schedule hereto annexed, marked Schedule A," a sum of money not mentioned in the Schedule A, annexed to the deed of assignment, did not pass to the assignee for the reason that the general words of the deed were restrained and limited by the reference to the schedule.[2]

§ 137. So in New Hampshire, where a debtor assigned "all and all manner of goods, chattels, debts, demands, moneys, and other things of him, the said D., whatsoever, as well real as personal, of what kind, or nature, or quality whatsoever, in the schedule hereto annexed, and particularly mentioned and expressed," it was held that the latter words were restrictive, and that nothing would pass by the assignment unless it was specified in the schedule.[3] And in the same State, where an assignment was made by an individual of "all his property, real and personal, in the schedule annexed particularly mentioned," to be paid out to the several

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[1] United States v. Langton, 5 Mason, 280.

[2] Mims v. Armstrong, 31 Md. 87; citing Wood v. Radcliffe, 5 Eng. L. & Eq. 471; Wilkes v. Ferris, 5 Johns. 335, and this treatise; and see Guerin v. Hunt, 6 Minn. 375. And so if the specification follows the words of grant in the instrument. Price v. Haynes, 37 Mich. 487.

[3] Rundlett v. Dole, 10 N. H. 458.

persons named in the schedule, where all the names of the creditors were not mentioned, it was held that the assignment was invalid under the statute of July 5, 1834, as not showing either an assignment of all the property, or as made to all the creditors.[1] So in Massachusetts, where the debtors assigned "all their books, stock in trade, printing apparatus and machinery, books of account, book debts, notes and demands, and all their other property of every name and nature, except such as is exempt from attachment, most of the same being now at their place of business, a schedule of which is annexed;" and it was expressed that other and fuller schedules of the property assigned should be annexed as soon as the same could conveniently be made; and the schedule annexed to the assignment contained three items, viz.: stock of books in store, printing presses and materials, notes and demands, &c.—it was held that the words of the assignment, though broad enough in themselves to comprise furniture of one of the partners, were restricted by the schedule; that the furniture was not included in the schedule, as originally made, the "*&c.*" being applicable to things *ejusdem generis;* and that parol evidence that the assignment was intended to embrace the furniture was inadmissible, because it would vary the written instrument.[2] And in a case in England, where a bill of sale purported to assign to G. R. "all the household goods and furniture of every kind and description whatsoever, in the house No. 2 Meadow Place, more particularly mentioned and set forth in an inventory or schedule of even date, and given up to the said G. R. on the execution thereof;" but the inventory did not specify all the goods and furniture in the house—it was held that the bill of sale only operated as an assignment of the goods and furniture specified in the inventory.[3]

§ 138. In the earlier cases in New York this doctrine

[1] Beard v. Kimball, 11 N. H. 471.
[2] Driscoll v. Fiske, 21 Pick. 503.
[3] Wood v. Rowcliffe, 20 L. J. N. S. Exch. 285; 5 Eng. L. & Eq. 471.

was applied,[1] but in the later cases the principle of construction prohibiting a false or erroneous addition from vitiating what had been previously sufficiently and fully described as a portion of the subject-matter intended to be transferred by the instrument, has been regarded as the correct rule of construction in such cases. Thus, in the case of Turner v. Jaycox,[2] where the transfer was of "all and singular the lands, tenements and hereditaments situate, lying and being in the State of New York, and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt, and property of every name and nature whatsoever of the said parties of the first part, more particularly enumerated and described in the schedule hereto annexed, marked Schedule A," and no allusion was made in the schedule to any of the tangible personal property of the assignors, it was held that such property passed under the previous general description.[3]

An assignment of a greater amount of property than is sufficient to pay the debts thereby to be secured, is not, of course, fraudulent; but if the excess be great, it will be presumptive evidence of fraud.[4]

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[1] Wilkes v. Ferris, 5 Johns. 335; Moir v. Brown, 14 Barb. 39; see Keep v. Sanderson, 2 Wis. 42; Crawford, J., Id. 60, 61.

[2] 40 N. Y. 470; s. c. 40 Barb. 164; but see Kircheis v. Schloss, 49 How. 284; Hotop v. Neidig, 17 Abb. Pr. 332; Birchell v. Strauss, 28 Barb. 293.

[3] See comments of Selden, J., on Wilges v. Ferris, *supra*, in Platt v. Lott, 17 N. Y. 481.

In Clark v. Few (62 Ala. 243), the terms of the assignment were very broad, and included "all the property, real, personal and mixed," of the assignor.

Schedules of the property, *so far as remembered*, were annexed, and any property omitted was expressly declared to be nevertheless conveyed. It was held that "the generality of the description of the property intended to be conveyed by the assignment for the benefit of creditors, does not affect its validity, when, by the aid of parol evidence, a definite application of the terms may be made."

Though the schedule does not embrace the demand (in this case a judgment sought to be reached by garnishment), and though it embraced certain choses in action and credits of the assignor, if the demand is the property of the assignor it passes.

In Knefler v. Shreve, 78 Ky. (1 Rodm.) 297, under similar provisions, the income of property held in trust for the benefit of the debtor, although not mentioned in the schedule, was held to pass to the assignee.

[4] Hastings v. Baldwin, 17 Mass. 552; Burlingame v. Bell, 16 Id. 318; and see further, on this head, *ante*, § 99.

§ 139. *When the Schedules should be Annexed.*—Where schedules are intended to be prepared, and are referred to in the assignment, they should, in strictness, be prepared before the assignment is drawn; or, at any rate, be in readiness, so as to be annexed to the instrument before it is executed. In some cases, however, where time has not been allowed for the preparation of schedules, particularly those of the property assigned, an assignment executed without schedules, and only referring to them as "to be made out and annexed" at a future time, has been adjudged valid. Thus in Connecticut, where the property assigned was described as "all the real and personal property of the assignors, of every description, in this State, except their household furniture," a schedule of which property was to be made out and annexed thereto as soon as convenient—it was held that the assignment was not invalid because the schedule referred to was not then in existence.[1] So, in Massachusetts, where an assignment described the property in general terms, and provided that a schedule of the property should be prepared and made a part of the instrument when completed, it was held that the annexation of the schedule was not a condition precedent to the operation of the assignment.[2] So in New York, where an absolute assignment of all the assignor's property and choses in action contained a provision that the assignor would, with all convenient speed, make out an inventory of such property and choses in action, and which inventory, when made out, was to be considered a part of the assignment—it was held that the assignment conveyed a present interest to the assignee, and that its taking effect did not depend upon the making out of the inventory.[3] And in England, a deed referring to a schedule as annexed, which was not in fact annexed until after its execution, was held valid.[4] But in a case in New York, where the property as-

[1] Clark v. Mix, 15 Conn. 152.
[2] Woodward v. Marshall, 22 Pick. 468; Stamp v. Case, 41 Mich. 267.
[3] Keyes v. Brush, 2 Paige, 311. [4] West v. Steward, 14 Mees. & W. 47.

signed was described as "all and singular the lands, tenements, &c., situate, &c., and all the goods, chattels, &c., and property of every name and nature whatever of the said parties of the first part, more particularly enumerated and described in the schedule *hereto annexed* marked Schedule A;" but Schedule A was not annexed until after the assignment had been executed and recorded—it was held that such schedule was a necessary part of the assignment, as showing what property passed by it, and that without it the assignment was insensible, imperfect and inoperative; and, as against creditors, did not convey the property to the assignees.[1] More will be said on this subject in considering the schedule as a part of the assignment.[2]

§ 140. *Habendum.*—After the description of the property intended to be assigned, follows the *habendum*, or formal clause, expressing the legal estate[3] which the assignee is to have in it: "To have and to hold the same to [the assignee, naming him], his heirs, executors, administrators and assigns" [or, if there be more than one assignee, "to [the assignees], and the survivors and survivor of them, their and his heirs," &c.].[4] Where there are several assignees, and especially where the assignment conveys real estate, it is advisable to use words expressive of survivorship, so as to avoid all ground of question as to the estate taken by them, whether it be a joint tenancy, or tenancy in common;[5] al-

[1] Moir v. Brown, 14 Barb. 39; see *post*, p. 195, note 6. In the case of Kellogg v. Slauson, in the same court, and decided about the same time, (15 Barb. 56), in which it was held that the omission of a schedule of the property would not avoid the assignment, there was no reference to a schedule as annexed. And see Kircheis v. Schloss, 49 How. Pr. 284.

[2] See *post*, pp. 195 *et seq.*

[3] A deed of trust to secure debts must convey the legal as well as the equitable title. Rossett v. Fisher, 11 Gratt. 492.

[4] The technical meaning of the word "premises" is everything which precedes the *habendum*, and it is in the premises of a deed that the thing is really granted. Farquharson v. Eichelberger, 15 Md. 63. Under a deed of trust to sell and pay debts, the fee may pass by necessary implication without the word "heirs." Farquharson v. Eichelberger, *supra*.

[5] A question of this kind arose in the case of Benedict v. Morse, 10 Metc. 223. The court, however, held it unnecessary to be decided in the case, because, *quacunque via data*, the defendant could not avail himself of the legal difference between the two estates. Hubbard, J., Id. 228.

though in New York every estate vested in trustees is declared by statute to be held in joint tenancy.[1]

§ 141. *Declaration of Trusts.*—Immediately following the *habendum*, and in fact constituting a part of it, is that portion of the instrument (commencing with the words "In trust" or "Upon trust"), which declares the *trusts* upon which the assigned property is to be held, in the form of *directions* to the assignee what disposition to make of it. These trusts may be ranked under two general heads: first, to reduce the property into a form in which it may be distributed; and secondly, to distribute it.

§ 142. *To Convert the Property into Money.*—In order to reduce the property into a form for distribution, the trusts or directions in this part of the assignment are, first, to take possession of the property assigned; second, to sell and dispose of it to the best advantage, and with the least delay;[2] and third, to collect and recover the debts due to the assignor.

§ 143. *To Apply and Distribute the Proceeds.*—The trusts or directions under this head comprise the following: first, to pay the expenses of the trust, including a reasonable compensation to the assignee or assignees, for his or their services;[3] secondly, to pay out of the residue all the creditors of the assignor named in the assignment, or in a schedule annexed and referred to, in full, or in proportion to their respective demands; and, after payment of the said creditors, and all the creditors, in full, thirdly, to pay over the residue to the assignor, his executors, administrators, or as-

[1] 3 Rev. Stat. (7th ed.) p. 2179, § 44.

[2] A power to sell and convey is necessarily implied by a conveyance of property for the payment of debts. Williams v. Otey, 8 Humph. 658; Hager, J., in Forbes v. Scannell, 13 Cal. 326. But it is always the practice to give the power or declare the trust for this purpose in express terms. As to special provisions respecting the sale, see *post*, Chap. XI. But it seems that an assignment of "goods, chattels, book accounts, stock debts, and all other estate and effects," does not give the assignee power of sale over real estate without express words. Boker v. Crookshank, 1 Phila. 198; and see In the Matter of the Assigned Estate of Gallagher, 5 Phila. 88.

[3] Canal Bank v. Cox, 6 Greenl. 395; Andrews v. Lunlow, 5 Pick. 28.

signs. These several trusts will now be considered more in detail.

§ 144. *To Pay the Expenses of the Trust.*—These expenses include costs of suits and of defenses, necessarily incurred by the assignee in collecting the debts and claims, and obtaining or retaining possession of the property assigned. They are sometimes provided for specifically in the assignment.[1] But although the deed contains no such provision, the law authorizes the retention by the assignee of all reasonable charges and expenses.[2]

§ 145. *To Retain a Reasonable Compensation to the Assignee.*—Sometimes the amount to be allowed the assignee for his services is fixed and specified in the assignment as a gross sum named,[3] or so much yearly. A stipulation that salaries shall be paid to the trustees, out of the trust property, has been expressly held to be not improper.[4] And even large salaries so stipulated to be paid do not make the deed fraudulent upon its face.[5] But where the trustees were to receive each eight thousand dollars per annum, the assignment was for this and other reasons held void as against creditors not parties.[6]

In New York, it is held that the debtor cannot provide for the trustees a higher rate of compensation than is allowed to executors, administrators, and guardians, for similar services.[7] A trustee is entitled to commission as compensation

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[1] A debtor may provide in an assignment for payment of present and prospective costs of suits going on, relating to some of the assigned property. Lentilhon v. Moffatt, 1 Edw. Ch. 451. A direction to the assignee to pay first of all the just and reasonable expenses, costs and charges, and commissions of executing and carrying into effect the assignment, and all reasonable and proper charges for attorney and counsel fees respecting the trust does not render the assignment invalid. Butt v. Peck, 1 Daly (N. Y.), 83; Iselin v. Dalrymple, 27 How. Pr. 137.

[2] Blow v. Gage, 44 Ill. 208.

[3] Andrews v. Ludlow, 5 Pick. 28.

[4] Vernon v. Morton, 8 Dana, 247.

[5] Ingraham v. Grigg, 13 Sm. & M. 22.

[6] Bodley v. Goodrich, 7 How. 276. Compensation to the assignee at a fixed sum, provided it should not exceed what the laws of the State allow to executors or administrators, and if it should exceed that amount, then at the rate so prescribed for executors and administrators, limits and does not enlarge their legal claims, and is unobjectionable. Keteltas v. Wilson, 36 Barb. 298.

[7] Barney v. Griffin, 2 N. Y. 365; Meacham v. Stevens, 9 Paige, 398. In the

for his labor in managing the trust committed to him, though no provision be made for it in the deed of trust.[1]

§ 146. *To Pay the Debts Designated or Referred to.*— Where the debts to be paid are few, it is frequently the practice to specify them in this part of the assignment. But where they are numerous, the more usual course is to refer to them as set forth in a *schedule* annexed. In both cases they should be described with sufficient certainty, in order that the assignee may not be at a loss, either as to the person or amount to be paid.[2] It has been held that a debt, to secure which a deed of trust has been executed, may be described by the name of the debtor, and its amount be left to be ascertained.[3] And parol evidence has been held admissible to show that a particular bill of exchange was intended to be secured by a deed of trust, though generally or improperly described in the deed.[4] But where a debt intended

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case of Duffy v. Duncan, 35 N. Y. 187, where the referee allowed the assignee the commissions payable to executors, Mr. Justice Leonard said that "had he found the commissions at the rate allowed to trustees by the Revised Statutes, when they are appointed in proceedings in relation to concealed and absconding debtors, I think his judgment would have remained undisturbed." In Wynkoop v. Shardlow, 44 Barb. 84, a commission of twenty per cent. for the collection of assigned accounts, consisting of small bills of account which cause much trouble and loss of time in their collection, was not considered unreasonable. And see Campbell v. Woodworth, 24 N. Y. 304; Eyre v. Beebe, 28 How. Pr. 333.

[1] Sherrill v. Shuford, 6 Ired. Eq. 228; Blow v. Gage, 44 Ill. 208. And see further, as to compensation to the assignee, *post*, Chap. XXXVI.

[2] In Caton v. Mosely, 25 Tex. 374, when the assignment recited that the assignor was indebted to sundry persons, but did not name them nor specify the amount of the assignor's indebtedness, but directed the assignee to hold said property and dispose of the same as soon as he could do so to the best advantage, for the benefit of any creditors, generally, the assignment was held invalid for uncertainty in not furnishing some certain means of ascertaining who were the creditors. But in many of the States, a method of ascertaining the debts to be paid is provided, and this objection would not in these States be of the same force.

[3] Platt v. Hodge, 8 Iowa, 386; Van Hook v. Walton, 28 Tex. 59; England v. Reynolds, 38 Ala. 370; Brown v. Knox, 6 Mo. 302; U. S. Bank v. Huth, 4 B. Mon. 423; Butt v. Peck, 1 Daly, 83; Halsey v. Whitney, 4 Mason, 206; Layson v. Rowan, 7 Rob. (La.) 1. In Hudson v. Ravett (5 Bing. 368; 2 M. & P. 663), where a blank was left in the deed for one of the principal debts, the precise amount of which was not ascertained until after its execution by the debtor, when it was inserted in his presence, and with his assent—it was held that by reason of such assent, the deed was valid from that time; but the court laid it down clearly that it was not a complete deed until then. West v. Steward, 14 Mees. & W. 48, 49, arg.

[4] Posey v. Decatur Bank, 12 Ala. 802; Platt v. Hodge, 8 Iowa, 386.

to be secured is not correctly described in the deed, though the creditor by identifying it may recover it out of the trust fund, while that remains, yet if the trustee has, *bona fide*, paid out the trust fund to discharge other debts, without any notice of the mistake by the creditor to the trustee, the creditor cannot make the trustee personally responsible.[1] In a case in Pennsylvania, where a debt due a creditor was put down in the assignment as "*about eleven* thousand dollars," which was, in fact, upwards of *thirteen* thousand dollars, it was held that the trust included the latter sum.[2] So, in Massachusetts, where a debt was described as "about $4,500," and the creditor proved claims to the amount of $5,867; it was held that he was entitled to a dividend on the latter sum.[3] But in a case in Kentucky, where a debt due to a creditor on a note was put down, by mistake, as $1,150, instead of $1,282, it was held that the mistake could not be corrected to the prejudice of other creditors; and that such creditors had a right to insist on the distribution of the fund according to the proportions recognized upon the face of the deed. If, however, there should be a surplus of the trust fund after paying these debts, the mistake might be corrected and the surplus applied accordingly.[4] If a deed of trust is intentionally made to secure to the creditor a larger amount than is justly due to him, it renders the deed void; but a miscalculation, mistake, or unintentional error will not vitiate it.[5]

It may happen, however, that a debtor is unable to state the names of all the creditors for whom he is desirous of

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[1] Allemand v. Russell, 5 Ired. Eq. 183.

[2] Brown v. Wier, 5 S. & R. 401; Canaday v. Paschall, 3 Ired. Eq. (N. Ca.) 178. So where the date of the debt was erroneously stated, the error was corrected. Miller v. Cherry, 3 Jones' Eq. (N. Ca.) 24. So an error in the name of the payee. Gardner v. Pike, Id. 306.

[3] Dedham Bank v. Richards, 2 Metc. 105.

[4] Miles v. Bacon, 4 J. J. Marsh. 458, 465. The opinion in this case was delivered by Underwood, J. But it is said that the chief justice was of opinion that the deed secured to the creditor the full amount of his note, and that the error as to the amount in the description of the note did not essentially affect the construction of the deed. Id. 465.

[5] Pennington v. Woodall, 17 Ala. 685; see *ante*, p. 158.

providing, in consequence of ignorance of the extent of his indebtedness. In such a case, a direction to the assignee to give public notice to creditors to present their claims at a reasonable time and place, and to pay those who shall comply with such notice, would be proper.[1] In a case in New York, it was held that a provision in an assignment directing the assignees, out of the net proceeds and avails of the assigned property, to pay to the laborers and workmen of the assignors, residing in Albany and Buffalo, the amounts due to them respectively for work and labor done for the assignors, would not avoid the assignment, although the names of those creditors, with their places of residence, and the respective amounts due to each, were not mentioned.[2]

§ 147. *To Pay Over the Surplus to the Assignor.*—It is usual to provide for the disposition of any ultimate surplus that may remain in the assignee's hands, after payment of all the assignor's debts, by a trust or direction of this kind, although, as we shall see, such a trust would result in favor of the assignor by the mere operation of law.[3] It will hereafter be shown under what circumstances reservations of this kind will avoid the assignment.[4]

§ 148. *Power of Attorney.*—After the particular trusts and directions which have just been described, follows a general power of attorney to the assignee, which must be irrevocable, to receive and recover the property and debts, to give receipts and acquittances, to collect by suit, &c.

§ 149. *Covenant by Assignee.*—Next follows the covenant, on the part of the assignee or trustee, by which he formally accepts the trust, and undertakes to execute it faithfully, to the best of his ability, according to the true intent and meaning of the assignment. It is usual, in this covenant, for the assignee to undertake to be responsible only

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[1] Ward v. Tingley, 4 Sandf. Ch. 476. In this case it was decided that a direction to the assignee to pay as a third class, and before other creditors, such as should comply with a notice of this kind, was valid

[2] Bank of Silver Creek v. Talcott, 22 Barb. 550.

[3] See *post*, Chap. XXXVIII.

[4] See *post*, Chap. XI.

for his own defaults, or moneys actually received by him; and where there are several, each assignee covenants for himself to be responsible only for his own acts and defaults, and not for those of his co-assignees. Under this head, it has been held that a provision that the trustee shall be responsible only for his own defaults must, on its face, be understood to import that he shall not be liable for the acts of such agents as are necessary to enable him to execute the trust, selected in good faith, with a due regard to their fitness, and with a proper supervision exercised over them.[1] But clauses intended to limit the assignee's responsibility have sometimes an injurious effect upon the assignment;[2] and in many of the forms in use, covenants on the part of the assignee are wholly dispensed with.[3]

§ 150. *Concluding Clause.*—The assignment concludes with the usual *in testimonium* clause: "In witness," &c.

§ 151. *Schedules.*—Appended to the assignment are the *schedules* of the property assigned, and of the debts or creditors provided for (or, as they are sometimes termed, schedules of assets and of liabilities), which constitute an important part of the instrument. Usually there is but one schedule of each kind, but sometimes several are employed. If possible, these schedules should be completed and annexed to the assignment before execution, but this is sometimes dispensed with. The general rule on this subject appears to be this, that the mere omission to annex the usual schedules is not in itself sufficient to avoid the assignment, and it has been so laid down in New Hampshire,[4] Massachusetts,[5] New York,[6]

[1] Ashurst v. Martin, 9 Port. 556; see Jacobs v. Allen, 18 Barb. 549.

[2] See Litchfield v. White, 3 Sandf. S. C. 545; and see *post*, Chap. XI.

[3] See Cunningham v. Freeborn, 1 Edw. Ch. 256; s. c. on appeal, 11 Wend. 240.

[4] Rundlett v. Dole, 10 N. H. 488.

[5] Stevens v. Bell, 6 Mass. 389; Halsey v. Whitney, 4 Mason, 206; Emerson v. Knower, 8 Pick. 63.

[6] Cunningham v. Freeborn, 1 Edw. Ch. 256, 264; affi'd on appeal, 3 Paige, 557; affi'd, 11 Wend. 240; see Keyes v. Brush, 2 Paige, 311; Kellogg v. Slauson, 15 Barb. 56; Mathews v. Poultney, 33 Id. 127; Terry v. Butler, 43 Id. 395; Hotop v. Neidig, 17 Abb. Pr. 332; Turner v. Jaycox, 40 N. Y. 470; Platt v. Lott, 17 N. Y. 478. But see the qualification of this rule in Averill v. Loucks, 6

Connecticut,[1] Missouri,[2] Mississippi,[3] Alabama,[4] Michigan,[5] New Mexico,[6] Virginia,[7] Kentucky,[8] California,[9] Iowa,[10] Texas,[11] Wisconsin,[12] and by the Supreme Court of the United States.[13] In some instances, and when taken in connection with other circumstances, this fact of omission may be considered a badge of fraud.[14] But the inference of fraud may be repelled by various circumstances. Thus, in Massachusetts, where the assignment itself contained a provision that schedules were to be made out as soon as might be, the

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Barb. 470; and see Kercheis v. Schloss, 49 How. Pr. 284; Moir v. Brown, 14 Barb. 39, cited *ante*, p. 189. In this last case, it was held that where the schedule was made a part of the conveyance, and is referred to as conveying a specification of property conveyed and intended to be annexed, it must be annexed at the time of execution, not only as a description and specification of the property, but as necessary, by the very terms of the instrument, to complete the conveyance or transfer. Hand, J., Id. 46, 48, 50. Under the act of 1860 as amended (Laws of 1874, c. 600), a failure to make and deliver the inventory and schedule required by the act did not invalidate the assignment. Previous to the amendment the decisions were in conflict. See also Hardman v. Bowen, 39 N. Y. 196; Juliand v. Rathbone, 39 N. Y. 369; s. c. 39 Barb. 97; Van Vleet v. Slauson, 45 Barb. 317; Evans v. Chapin, 12 Abb. Pr. 161; s. c. 20 How. Pr. 289; Barbour v. Everson, 16 Abb. Pr. 366; Read v. Worthington, 9 Bosw. 617; Camp v. Marshall, 2 Abb. Pr. N. S. 373; Fairchild v. Gwynne, 16 Abb. Pr. 28; s. c. 14 Id. 121.

Under the present law (Laws of 1877, c. 466; Laws of 1878, c. 318: 3 R. S. (7th ed.) p. 2277), the debtor is required to make and deliver an inventory or schedule; but if he does not the assignee must do so, or show cause why he should not be removed. See *ante*, p. 39.

[1] Clark v. Mix, 15 Conn. 152; see Laws of 1880, c. 52; Laws of 1882, c. 13.

[2] Duvall v. Raisin, 7 Mo. 449; Deaver v. Savage, 8 Id. [180] 252; Hardcastle v. Fisher, 24 Id. 70.

[3] Robins v. Embry, 1 Sm. & M. Ch. 207.

[4] Shackelford v. P. & M. Bank of Mobile, 22 Ala. 238; Brown v. Lyon, 17 Id. 659.

[5] Hollister v. Loud, 2 Mich. 310, 322; Nye v. Van Husan, 6 Id. 329; Stamp v. Case, 41 Id. 267; Coots v. Chamberlain, 39 Id. 565; Re Kimball, 16 N. B. R. 188.

[6] Leitensdorfer v. Webb, 1 N. Mex. 34.

[7] Lewis v. Caperton's Ex'r, 8 Gratt. 148; Gordon v. Cannon, 18 Id. 388.

[8] Ely v. Hair, 16 B. Mon. 230.

[9] Forbes v. Scannell, 13 Cal. 242; Poehlmann v. Kennedy, 48 Cal. 201.

[10] Meeker v. Saunders, 6 Iowa, 61. [11] Linn v. Wright, 18 Tex. 317.

[12] Bates v. Ableman, 13 Wis. 644; Ball v. Bowe, 49 Id. 495; Steinlein v. Halstead, 52 Id. 289.

[13] Brashear v. West, 7 Pet. 608, 614.

[14] McCoun, V. C., in Cunningham v. Freeborn, 1 Edw. Ch. 264; Sandford, A. V. C., in Van Nest v. Yoe, 1 Sandf. Ch. 4, 7; Allen, J., in Kellogg v. Slauson, 15 Barb. 56; Stevens v. Bell, 6 Mass. 339; Pearpoint v. Graham, 4 Wash. C. C. 232; Wilt v. Franklin, 1 Binn. 502, 514; Burd v. Smith, 4 Dall. 76; see Hower v. Geesaman, 17 Serg. & R. 251; Haven v. Richardson, 5 N. H. 113; Drakely v. De Forest, 3 Conn. 272; Moir v. Brown, 14 Barb. 39; Brown v. Lyon, 17 Ala. 659; Pine v. Rickert, 21 Barb. 469; Young v. Gillespie, 12 Heisk. (Tenn.) 239.

presumption of fraud was held to be removed.[1] So, in New York, where full schedules were presented to the court, in answer to a bill filed by a judgment creditor, the inference of fraud was held to be repelled.[2] So, if the property be described in the assignment with sufficient certainty to enable the assignee to take possession of it, the omission to annex a schedule, although provided for in the deed, will not render the assignment void.[3] And if possession accompany the transfer, and the transaction be, in all other respects, fair, the mere want of a schedule will not render it fraudulent.[4] Want of a schedule is less suspicious where the whole of the assignor's property is conveyed for the benefit of all the creditors, than where part of it is conveyed for particular creditors.[5] And in New York, the schedules required to be delivered and filed under the act are still to be regarded as part of the assignment, and where they contained fictitious debts, the assignment was deemed void.[6]

It has also been held that the annexation of a schedule, even where it is provided by the assignment that a schedule shall be made out and annexed as soon as may be, is not a condition precedent to the operation of the assignment.[7] If

[1] Stevens v. Bell, 6 Mass. 339; see Halsey v. Whitney, 4 Mason, 206.

[2] Cunningham v. Freeborn, 1 Edw. Ch. 264. But in another case in that State, where the schedule of the property assigned was referred to as annexed, but was not annexed until after the assignment had been executed and recorded, and after the commencement of a suit by purchasers of the property from the assignees against the sheriff who had levied upon the property under a creditor's execution, it was held that such subsequent annexation did not remove the objection to the validity of the assignment. Moir v. Brown, 14 Barb. 39; Hand, J., Id. 48. In this case, there was no evidence that the schedule was annexed by the authority of the parties, or with their knowledge. Id. ibid. See Spring v. Strauss, 3 Bosw. (N. Y.) 607; Kercheis v. Schloss, 49 How. Pr. 284.

[3] Emerson v. Knower, 8 Pick. 63; see Robins v. Embury, 1 Sm. & M. Ch. 207.

[4] Pearpoint v. Graham, 4 Wash. C. C. 232; see also Deaver v. Savage, 3 Mo. 252.

[5] Wilt v. Franklin, 1 Binn. 514, 523.

[6] Terry v. Butler, 43 Barb. 395. But in Indiana, the schedules are not a part of the assignment, and need not be recorded. Black v. Weathers, 26 Ind. 242.

[7] Emerson v. Knower, 8 Pick. 63; Woodward v. Marshall, 22 Id. 468; Keyes v. Brush, 2 Paige, 311; see Cunningham v. Freeborn, 3 Id. 557, 561; Kellogg v. Slauson, 15 Barb. 56; affi'd on appeal, 11 N. Y. 302. In Emerson v. Knower, the court remarked that the property passed, and was intended to pass, before any schedule should be taken.

the assignor neglect to furnish a schedule, the assignee may file a bill of discovery against him, and also to obtain a delivery of the books, &c.[1] And it has been decided in England, that the fact that there is no schedule to regulate the trust does not prevent the property from passing, unless the schedule be expected to show what passed by the deed.[2] In assignments giving preferences, the actual annexation of schedules of creditors is a matter of more importance.[3]

In some of the States, schedules are expressly required by statute to be annexed to the assignment. Thus, in New Jersey, the debtor is required to annex to his assignment an inventory under oath of his estate, real and personal, according to the best of his knowledge, together with a list of his creditors, and the amount of their respective claims.[4] But this inventory is declared to be in no wise conclusive as to the *quantum* of the debtor's estate, but the assignee will be entitled to any other property which may belong to the debtor at the time of making the assignment, and embraced in its general terms.[5] In Vermont, every assignment is required to be accompanied with a full inventory or schedule of the property assigned, including choses in action, and also with a list of the creditors to be benefited by the assignment, and the sums due each one, as near as may be.[6]

So in Iowa, but the inventory is not conclusive as to the amount of the debtor's estate;[7] and the want of an inventory does not invalidate the assignment.[8] And in Indiana, the assignment must be accompanied by a schedule containing a particular enumeration and description of all the personal property assigned.[9]

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[1] Keyes v. Brush, 2 Paige, 311.

[2] West v. Steward, 14 Mees. & W. 47. In Weeks v. Maillardet (14 East, 568), the schedule was material to show what passed. This case was relied on by the court in Moir v. Brown, 14 Barb. 49, 50.

[3] See *post*, p. 200.

[4] Rev. Stat. (ed. 1878), p. 87, § 2.

[5] Rev. Stat. of N. J. (ed. 1878), p. 87, § 2.

[6] Act of November 19, 1852; Laws of 1852, p. 14, § 2.

[7] Iowa Code of 1880, tit. 14, c. 7, §§ 2117, 2124.

[8] Meeker v. Saunders, 6 Iowa, 61.

[9] Stat. of Ind. (ed. 1876), vol. I, p. 143, § 2; see Black v. Weathers, 26 Ind. 242.

In regard to the form of the schedules, it may be observed that the items composing them should be stated with as much accuracy as possible.[1] But as entire correctness in this respect is not always attainable, it is sometimes the practice to insert a provision in the assignment that corrections may be made in the schedules, and such items and amounts be afterwards inserted as shall conform to the actual state of facts.[2] Where in a schedule of the property assigned sums were set against the different articles as the value of the property, it was held that the mere fact that these sums were entered in the schedule was not even *prima facie* evidence of the value of the property.[3] But in a case where the schedule of creditors contained only a list of the preferred creditors without specifying the amount of their several claims, it was held that such omission would not invalidate the deed, if it were in other respects unexceptionable.[4]

Having thus presented an outline of the simplest form of an assignment in trust for creditors, it remains to notice the peculiarities of the principal variations from this form,

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[1] As to the headings and contents of the schedules, and the inferences deducible from them, see United States v. Clark, 1 Paine, 629, 631, 641. Under the New York Law of 1877, c. 466; Laws of 1878, c. 318; Rev. Stat. (7th ed.) p. 2277, the inventory or schedule is required to contain:

"1. The name, occupation, place of residence and place of business of such debtor.

"2. The name and place of residence of the assignee.

"3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

"4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same, according to the best knowledge of such debtor.

"5. An affidavit made by such debtor, that the same is, in all respects, just and true."

[2] See Dedham Bank v. Richards, 2 Metc. 105; Halsey v. Whitney, 4 Mason, 206, 208; Re Wilson, 1 Monthly L. Bul. 5.

[3] Savings Bank v. Ela, 11 N. H. 335.

[4] Brown v. Knox, 6 Mo. 302.

as they are exhibited in assignments with preferences and assignments tripartite.

§ 152. *Assignments with Preferences.*—In assignments of this character, the preferences intended to be given are declared in that part of the instrument which specifies the particular debts to be paid, immediately after providing for the expenses of the trust. These preferences, as we have seen, must be distinctly declared, and the order of payment fixed by the assignment itself, or by the schedules annexed to it; and not be left open to future alteration, either by the assignor or assignee. Where the creditors are few, this part of the instrument may be expressed substantially as follows: "First, to pay and discharge a certain debt (describing it); secondly, to pay and take up a certain note (describing it); thirdly, after full payment of the said debt and note, out of the residue, if any, to pay all the other creditors of the said party of the first part, in proportion to their respective demands." But where the creditors are numerous and arranged in classes, it is usual to name them in the schedule of creditors as "class number one," "class number two," &c., referring to them in the assignment substantially in this form: "First, to pay in full the creditors named and designated in Schedule A, hereto annexed, as class number one; secondly, to pay the creditors named in said schedule as class number two," &c. Sometimes a separate schedule is employed for each class; and the reference is then to the schedules in their order.

§ 153. Where a preference is intended to be indicated by a schedule, it must be distinctly shown by some separation of the debt intended to be preferred from the other debts specified. The mere placing of a debt at the head of a schedule is not sufficient.[1] And where an assignment refers to one or more schedules, as fixing the order in which certain preferred creditors shall be paid, it is essen-

[1] Winslow v. Assignees of Ancrum, 1 McCord's Ch. 100; see Colgin v. Redman, 20 Ala. 650.

tial that they should be annexed to the assignment previous to its execution, unless the assignment itself prescribe what debts shall be inserted in them, and in what order. Accordingly, where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto, according to the priority of the several schedules, and provided that such schedules should be made within sixty days, and be annexed to and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein, the preparation of such schedules being left entirely to the discretion of the assignors; and it appeared that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time—it was held by the Supreme Court of New York that the assignment was fraudulent and void.[1]

§ 154. *Assignments Tripartite.*—In these assignments, the parties are arranged in three parts; the debtor being the party of the first part, the assignee of the second part, and the creditors of the third part.[2] Their principal peculiarities are the covenants which they contain on the part of the several parties, and which the form of the instrument admits to a great extent. Thus, the debtor covenants that he will aid the assignee in the receipt and collection of the debts and property—will ratify and confirm all his lawful acts under the assignment—and will do all further acts necessary in the execution of the trust. The assignee covenants to execute the trust—to account with the creditors—and make just distribution among them. And the creditors formally accept the provisions of the assignment, in full payment of

[1] Averill v. Loucks, 6 Barb. S. C. 470; see Kercheis v. Schloss, 49 How. Pr. 284.

[2] This is the proper form of an assignment according to the English practice, as illustrated in several important cases. See Estwick v. Caillaud, 4 Term R. 420; Inglis v. Grant, Id. 530; Bowker v. Burdekin, 11 Mees. & W. 128; West v. Steward, 14 Id. 47; Janes v. Whitbread, 20 L. J. C. P. (N. S.) 217. It has also been the prevailing form in Massachusetts, and still is in Maine and other New England States.

their respective debts, and release and discharge the debtor from all claims and demands. There are also frequently inserted a variety of clauses giving special powers to the assignee, and marking out, in considerable detail, the course of his proceedings in the execution of the trust.

In the execution of these instruments, it is usual to employ counterparts, so that the transfer may be made complete by a delivery to the assignee, in case the assignment is retained by the debtor for any purpose, as to procure the signatures of creditors.[1]

[1] Marston v. Coburn, 17 Mass. 454, 457.

CHAPTER IX.

PARTIAL ASSIGNMENTS.

§ 155. A partial assignment is an assignment of a portion of a debtor's property, in trust, for the benefit of his creditors,[1] and is distinguished, on the one hand, from a *special* or particular assignment, which is made directly to the creditor, in payment or as security; and, on the other, from a *general* assignment, the nature of which has already been explained.[2] A general assignment, with an express exception of part of the debtor's property, is, in effect, a partial assignment, and has been so treated.[3] An assign-

[1] The term *partial* has been occasionally applied to assignments in another sense, namely, as descriptive of the disposition made of the assigned property by the assignor, where he prefers one or more creditors to others. Thus, in Riggs v. Murray (2 Johns. Ch. 565, 577), assignments with preferences are called *partial* assignments.

[2] If an assignment in trust does not, on its face, purport to be of all the assignor's property, it will be treated as a partial assignment. See Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Lentilhon v. Moffatt, 1 Edw. Ch. 451; Halsey v. Whitney, 4 Mason, 206. An assignment which, on its face, purports to be but a partial assignment, is so to be regarded and treated until the contrary is shown. Redfield, C. J., in Mussey v. Noyes, 26 Vt. 462, 474. But in a case where an assignment in terms conveyed all the property which the assignors owned in certain towns named, and it did not appear, either upon the face of the assignment or from the evidence, that they owned any property which was situated elsewhere, it was held in Vermont that the court would infer that *all* the property which the assignors owned was thereby conveyed. Dana v. Lull, 17 Vt. 390. So in Maryland, an assignment for the benefit of creditors stipulating for releases must, on its face and by its terms, convey all the property of the grantor, and unless it does so it is void, no matter whether it does in fact convey all his property or not. Rosenberg v. Moore, 11 Md. 376; Barnitz v. Rice, 14 Id. 24; Malcolm v. Hodges, 8 Id. 418.

[3] Ingraham v. Grigg, 12 Sm. & M. 22. An assignment which, on its face, purports to convey all the assignor's property, when, in fact, he has other property not disclosed in the assignment, is void as against creditors; but if it does not so purport, it is valid, notwithstanding property may remain in the hands of the assignor unassigned. Pearce v. Jackson, 2 R. I. 35. And where the assignor had real estate not conveyed to the assignee (the assignment gave preferences but did not stipulate for releases), this did not render the assignment void. Bates v. Ableman, 18 Wis. 644. In that case Mr. Justice Paine said the answer to this objection is, that if the property is not conveyed it is left as it was before, liable to seizure. See State v. Benoist, 37 Mo. 500; Carpenter v. Underwood, 19 N. Y. 520; Knight v. Waterman, 36 Penn. St. 258; Baldwin v. Peet, 22 Tex. 708; Henry v. Root, 38 Mich. 371.

ment of partnership effects is a partial one, whenever the debtor has separate property which is not conveyed.[1] There may be cases where a debtor may find it expedient to provide for creditors by a partial assignment, but transfers of this kind are comparatively rare in practice, and when made, are usually preliminary either to further transfers of the same kind,[2] or to a general assignment.[3] If the appropriation of part of the debtor's property be found sufficient to liquidate all claims against him, it is usually made in a different and more direct form; and if it be insufficient, an assignment of such portion, without any further transfer, is of little value, the unassigned residue being open to the remedies of creditors, the same as if it had not been made.

§ 156. *Stipulations for Releases.*—It is true that assignments of this description have sometimes been made with a stipulation for a full release by the creditor as the condition of receiving the benefit of them; and in the important case of Halsey v. Whitney,[4] Mr. Justice Story gave effect to such a condition in a partial assignment. But it is remarked by Chancellor Kent, in commenting on the decision in this case, that the learned judge's own judgment was not satisfied

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[1] Gibson, C. J., in Thomas v. Jenks, 5 Rawle, 221.

[2] This was the case in the United States v. The Bank of the United States, 8 Rob. (La.) 262.

[3] This was the case in Johnson v. Whitwell, 7 Pick. 71. In Nicholson v. Leavitt (4 Sandf. S. C. 252), the debtor's property was transferred by several partial assignments, followed by a general assignment. In Johnson v. Whitwell, a partial assignment had been made, as a temporary arrangement, for the benefit of three creditors, with the understanding and expectation that a general assignment should afterwards be made for the benefit of all the creditors. The partial assignment was, in fact, canceled, and the general assignment made in the same form. But the first deed was held void, as intended to cover the property and intercept attachments. So in the case of Holt v. Bancroft (30 Ala. 195), where a partial assignment was made eight days previous to the execution of a general assignment, and it appeared that the intention to make the general assignment existed at the time the first instrument was executed, and the same trustee appointed in both, the entire transaction was taken together and deemed void as giving preferences.

[4] 4 Mason, 206. The assignment in this case did not, on its face, purport to convey all the debtor's estate. It was, however, suggested at the bar, that in point of fact the debtor had no other property. Story, J., Id. 218. In the reporter's statement of the case, the assignment is said to have been of all the debtor's property. Id. 207. See the observations of Curtis, J., in Stewart v. Spencer, 1 Curt. 157, 164.

with the authorities under which he acted, and that partial assignments with such a condition ought not to be tolerated.[1] It appears, indeed, to be now the settled rule in New York, that an assignment to a trustee, of part of the debtor's property, upon condition of a full release, is void;[2] such a condition being regarded as oppressive, coercive, and unjust as against creditors.[3] The same rule has been adopted, and for similar reasons, in Pennsylvania,[4] Maryland,[5] Virginia,[6] Mississippi,[7] and Indiana.[8] On this principle, it was held by the Supreme Court of Pennsylvania, that an assignment by partners, of the partnership effects, and not of their separate property also, if it contain a condition that

[1] 2 Kent's Com. [534] 695, note a.

[2] Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Lentilhon v. Moffatt, 1 Edw. Ch. 451; Grover v. Wakeman, 11 Wend. 187; Berry v. Riley, 2 Barb. S. C. 307. See the observations of Clayton, J., in Ingraham v. Grigg, 13 Sm. & M. 22, 30; Austin v. Bell, 20 Johns. 442; see Seldon, J., in Dunham v. Waterman, 17 N. Y. 9.

[3] Kent, C., in Seaving v. Brinkerhoff, 5 Johns. Ch. 332. The chancellor said, in this case, "A partial assignment upon such a condition, is pernicious in its tendency, if it be not (as I rather apprehend it to be) fraudulent in its design." Id. ibid.

[4] Thomas v. Jenks, 5 Rawle, 221; Hennessy v. The Western Bank, 6 W. & S. 300; In re Wilson, 4 Barr, 480. In the last case, Rogers, J., speaking of the former decisions, observed: "It was ruled that such an assignment was against the policy of the law; that the condition was oppressive, without the color of justice, and evinced on the face of the instrument a fraudulent design; that it was taking an unfair advantage of the situation of the creditor, to impose the condition of a release, unless on the terms of the surrender of all the debtor's property. We thought so then, and, notwithstanding all that has been so pertinaciously and strenuously urged to the contrary, we are of the same opinion still." Id. 448, 449. In Wiener v. Davis (13 Penn. St. 331), it was held that, since the act of 1843, an assignment by a debtor, of part of his property, to some of his creditors, they stipulating to give a release, is not necessarily void. See opinion of Agnew, J., in Miners' National Bank Appeal (57 Penn. St. 193), reviewing the history of legislation and decision in Pennsylvania.

[5] An assignment for the benefit of creditors, exacting releases as the condition on which they may participate in the fund, must transfer *all* the debtor's estate. Green v. Trieber, 3 Md. 11; see Sangston v. Gaither, Id. 40; Rosenberg v. Moore, 11 Md. 376; Barnitz v. Rice, 14 Id. 178; Bridges v. Wood, 16 Id. 102; Whidbee v. Stewart, 40 Id. 414.

[6] Skipwith's Ex'r v. Cunningham, 8 Leigh, 271, 291; Gordon v. Cannon, 18 Gratt. 387; 2 Tuck. Com. [442] 431.

[7] Ingraham v. Grigg, 13 Sm. & M. 22. In this case, Clayton, J., observed: "A debtor in failing circumstances cannot devote a part of his property to the payment of his debts, reserve a part, and say to his creditors, that they shall not touch the part so devoted unless upon surrendering all claim to that which is reserved. In other words, a debtor cannot keep any part of his property from his creditors, except that which the law secures to him; and any attempt to do so amounts to a fraud." Id. 30.

[8] Henderson v. Bliss, 8 Ind. 100.

the creditors shall release their claims against the assignors individually, and as copartners, is fraudulent and void.[1] And where an assignment by the members of a firm purported to convey merely the partnership goods and effects, with certain specified real estate, in trust for certain preferred creditors, and then in trust for such as should execute a release, but contained no words of conveyance of the private or individual estate of either member of the firm, and did not even purport to convey all the real estate of the firm, it was held by the same court to be invalid.[2]

§ 157. *Preferences.*—In some of the States assignments for the benefit of creditors are required to convey all the debtor's estate, and in some, such assignments will be construed to pass all the estate, whether purporting to or not; but, independently of statute, partial assignments, when they leave the unassigned residue open to the claims of creditors, are valid conveyances,[3] and they have been so held in England.[4] In some instances, also, where preferences have been prohibited in general assignments, they may still be made in partial assignments,[5] or by means of such conveyances. But in other States, even where preferences are

[1] Thomas v. Jenks, 5 Rawle, 221.

[2] Weber v. Samuel, 7 Barr, 499. Whether an insolvent debtor who assigns but a part of his property for the benefit of all his creditors, can stipulate for a release in Rhode Island, see Stewart v. Spencer, 1 Curt. 157, 166; and see Le Prince v. Guillemot, 1 Rich. Eq. 187.

[3] Fisher v. Dinwiddie, 12 B. Mon. (Ky.) 208; Ingraham v. Grigg, 13 Sm. & M. 22; Du Bose v. Carlisle, 51 Ala. 590; Leitensdorfer v. Webb, 1 N. Mex. 34; Pearce v. Jackson, 2 R. I. 35; State v. Benoist, 37 Mo. 500.

[4] Estwick v. Caillaud, 5 Term R. 420; Goss v. Neal, 5 J. B. Moore, 19.

[5] Thus, in Iowa, where preferences in general assignments invalidate the conveyance, "it is still competent," says Mr. Justice Cole, in Samson v. Arnold (19 Iowa, 480), "for any debtor to pay a part of his creditors in full, to secure another part by mortgage or deed of trust upon a part of his property, to make a partial assignment of still other property for the benefit of certain other creditors, with or without preference, and afterward to make a general assignment;" and see Fromme v. Jones, 18 Iowa, 474; Davis v. Gibson, 24 Id. 257; Farewell v. Howard, 26 Id. 381. So in Alabama, where preferences are not permitted in general assignments, the right of preferring creditors by partial assignments is untouched. Holt v. Bancroft, 30 Ala. 195; Stetson v. Miller, 36 Id. 642. So in Missouri. Johnson v. McAllister's Assignee, 30 Mo. 327; State v. Benoist, 37 Id. 500; Shapleigh v. Baird, 26 Id. 322; Woods v. Timmerman, 27 Id. 107; Many v. Logan, 31 Id. 91. These decisions were mainly under the act of 1855; but compare Stat. of Mo. (Wagner), c. 9, p. 150.

allowed in general assignments, they will not be sustained in transfers for the benefit of creditors of less than the entire estate.[1]

§ 158. *Priority to United States.*—Partial assignments are not within the provisions of the act of Congress of March 2, 1799, giving priority of payment to the United States, in cases of insolvency; nor are they within those of the act of March 3, 1797, giving similar priority of payment out of the property of an insolvent who had made a voluntary assignment for the benefit of his creditors; such priority existing only in cases of *general* assignments by debtors.[2] But if only a trifling portion of the assignor's estate be reserved, especially for the purpose of evading the law, such reservation will not make the assignment a partial one.[3] And a party cannot, by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial.[4]

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[1] See *post*, Chap. X.

[2] United States v. Hooe, 3 Cranch, 73; Conard v. Atlantic Ins. Co. 1 Pet. 386; Story, J., Id. 439; United States v. Clark, 1 Paine, 629; United States v. McLellan, 3 Sumn. 345; United States v. Bank of the United States, 8 Rob. (La.) 262.

[3] United States v. Hooe, 3 Cranch, 91; United States v. McLellan, 3 Sumn. 345; see Dias v. Bouchaud, 10 Paige, 485, 448, 461.

[4] United States v. Bank of the United States, 8 Rob. (La.) 262. In United States v. Griswold (8 Fed. Reptr. 496), it was held that a debtor of the United States may assign his property, within the meaning of the statute, by means of judgments confessed in favor of various persons, for amounts equal in the aggregate to the value thereof, and the priority of the United States will thereupon attach to the property and prevail against the judgments, but subject to all prior liens thereon.

CHAPTER X.

ASSIGNMENTS WITH PREFERENCES.

§ 159. Assignments in trust for the benefit of creditors, giving preferences to certain creditors, or certain classes of creditors, over others, though here treated, for the sake of convenience, as exceptional forms, have in fact constituted, until recently, one of the most common descriptions of this species of transfer in use in this country. They present the form which an assignment seems, in most instances, to have naturally taken, wherever a debtor has been allowed to be the distributor of his property among his creditors, as distinguished from the equal distribution provided by law, through the medium of systems of bankruptcy and insolvency; but they have always been a subject of criticism, objection, or open condemnation, as founded on an unjust and erroneous principle. In the courts, where their principle, policy, and practical operation have been daily investigated and discussed, they have been viewed, especially of late, with a growing sentiment of jealousy and disfavor; and the continued use of them has finally led to most of the legislative interposition by which an insolvent debtor's power of assignment has been controlled, and its exercise regulated by specific provisions.[1]

It will be most convenient to consider the subject of this chapter under the following heads: I. The right to prefer. II. Restrictions on the right. III. Subjects of preference. IV. Modes of giving preferences. V. Illegal and fraudulent preferences.

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[1] While the bankrupt act remains in force, assignments with preferences will be unfrequent, but as they may still be made, and are occasionally brought before the courts for review, this chapter is retained, with brief citations of the cases reported since the previous edition. See Chap. III for questions arising under the bankrupt act, relating to preferences in assignments.

§ 160. I. *Right of a Debtor to Prefer a Creditor.*—It has long been a settled rule in England and American law (subject to qualifications which will be considered), that a debtor in failing circumstances,[1] may not only dispose of his property in trust for the use and benefit of his creditors generally, but may, by such a conveyance, give a preference, in payment, to one creditor before another, or to one class of creditors before another class.[2]

This rule may be viewed as the result of a gradual expansion of the acknowledged principle, that a debtor owing several creditors, and not having the means of paying them all, may *pay* one in preference to another, or some in preference to others;[3] in other words, that he has the right of *selection* in this mode of satisfying their demands; and that a payment thus made to one creditor, in good faith, cannot be questioned or interfered with by another.[4] This principle

[1] See *ante*, p. 28.

[2] 2 Kent's Com. [532] 689; 1 Tucker's Com. [335] 325; 2 Id. [443] 432. Marshall, C. J., in Brashear v. West, 7 Pet. 608, 614; Mackie v. Cairns, 1 Hopk. 278; Sutherland, J., in Grover v. Wakeman, 11 Wend. 187, 194; Gaston, J., in Hafner v. Irwin, 1 Ired. L. 490, 496; Harris, J., in Webb v. Daggett, 2 Barb. 9, 11; Gamble, J., in Richards v. Levin, 16 Mo. 596, 598, 599; Totten v. Brady, 54 Md. 170; Hanscom v. Buffum, 66 Me. 246.

[3] Sandford, C., in Mackie v. Cairns, 1 Hopk. Ch. 378, 406; Curtis, J., in Stewart v. Spenser, 1 Curt. 161, 162.

[4] In the case of Tillou v. Britton, in the Supreme Court of New Jersey (4 Halst. 120, 136), Mr. Justice Ford, in delivering his opinion, observed as follows: "The law contains no such principle as that a man in failing circumstances may not pay any just debt first, which will best relieve his circumstances. If, while a man retains his property in his own hands, the right of giving preferences should be denied, he would so far lose the dominion over his own, that he could not pay *anybody*, because whoever he paid would receive a preference. He could only pay ratably, which is never incumbent till after he has taken the benefit of the insolvent laws, or has assigned his property to trustees for the benefit of creditors, and so put the dominion over it into other hands. Accordingly, it was decided by this court, in the case of Hendricks v. Mount, 2 South. 743, that the making of such preferences was *every day done, was every day sustained in our courts of justice, and is legal.*" In the case of Blakey's Appeal, in the Supreme Court of Pennsylvania (7 Barr, 449, 451), Coulter, J., observed; "It is only when a man loses dominion over his property, and transfers that dominion to another, that the right of creditors to a *pro rata* dividend attaches. Whilst a man retains dominion of his property, he may encumber and convey it as he pleases, if not directly forbidden by law, and prefer such creditors by payment or transfer as he chooses. And if it were not so, an individual could not get along in his business." And see Uhler v. Maulfair, 23 Penn. St. 481; Hopkins v. Beebe, 26 Id. 85. "It is settled," says Walworth, Chancellor, in Wakeman v. Grover (4 Paige, 23, 36), "that the insolvent has the right, while his property remains in his own hands, to apply the same to the payment of one creditor in preference to another, not-

has been admitted in England, even under the stringent system of the bankrupt law;[1] and it has been broadly laid down by the Supreme Court of the United States, that a debtor may prefer one creditor, pay him fully, and exhaust his whole property, leaving nothing for others equally meritorious.[2] The same principle has been affirmed by the State courts.[3] Even in Massachusetts, where a system of insolv-

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withstanding the principle of this court, that equality among creditors is equity." See the observations of Nelson, J., in Cunningham v. Freeborn, 11 Wend. 256; of Wright, J., in Atkinson v. Jordan, 5 Ohio, 178; and of Wheeler, J., in Edrington v. Rogers, 15 Tex. 188; and see Kuykendall v. McDonald, 15 Mo. 416; Gassett v. Wilson, 3 Fla. 235.

In Surget v. Boyd (57 Miss. 485), it was held that a deed of trust made by a debtor against whom a suit for a large amount is pending, just before judgment, to secure pre-existing debts due his relatives and friends, is valid. Unless such security is a sham never to be enforced, other creditors can vacate it only by showing that the secured debts are simulated, or that some benefit is reserved to the grantor.

[1] In the early case of Hopkins v. Gray (7 Mod. 139), it was held by Lord Holt, that if a banker or goldsmith who has many peoples' money refuse payment, yet keep his shop open, and as often as he is arrested give bail, he may by that means give preference of payment to his friends; and when he has done, if he runs away, yet such payment shall stand against a commission of bankruptcy; and his lordship cited the case of Sheppard the banker in confirmation of this doctrine. In the case of Cock v. Goodfellow (10 Mod. 489, 497), Lord Chancellor Parker said: "A man that knows he must be a bankrupt, may by law pay off any of his creditors." The modern English cases establish the principle, that a preference given to a creditor by payment is not fraudulent, unless it appears to have been voluntary, without pressure by the creditor, and with the view of giving a fraudulent preference in contemplation of bankruptcy. Cook v. Pritchard, 6 Scott N. R. 34; 5 Mann. & Gr. 329; Green v. Bradfield, 1 Carr. & K. 449; Ogden v. Stone, 11 Mees. & W. 494; Kynaston v. Crouch, 14 Id. 266; Brown v. Kempton, 19 L. J. C. P. (N. S.) 169; Hale v. Allnutt, 36 Eng. L. & Eq. 383. But see the bankrupt act 1869, 32 & 33 Vict. c. 71. Fraudulent preference has now for the first time been defined by the legislature. The whole law of bankruptcy is to be found in the bankruptcy act 1869, and the whole law of fraudulent preferences in § 92 of that statute. See Ex parte Mathew in re Cherry, 19 W. R. 1005; s. c. on appeal; Ex parte Boland, L. R. 7 Ch. Ap. 24; Ex parte Craven, L. R. 10 Eq. 648; s. c. on appeal; Ex parte Tempest, L. R. 5 Ch. Ap. 70. So it has been held, under the United States bankrupt law of 1800, that if a person on the eve and even in contemplation of bankruptcy pay money, give security, or assign property to a creditor, it will be valid if the effect of measures taken by the creditor, or if done at the creditor's instance and on his application. But if done voluntarily, without solicitation or compulsion, and merely to prefer one creditor to another, it will be fraudulent and void. Ogden v. Jackson, 1 Johns. 370, 373; Phœnix v. Ingraham's Assignees, 5 Id. 412; and see, under the act of 1841, Ex parte Garwood and Ex parte Potts, Crabbe, 516; Atkinson v. The Farmers' Bank, Id. 529. As to what will constitute a fraudulent preference under the act of 1867, see Bump on Bank. (8th ed.) pp. 792 *et seq.* and cases cited; see Mays v. Fritten, 20 Wall. 414; Wilson v. City Bank, 17 Wall. 473.

[2] Clark v. White, 12 Pet. 178; see Tompkins v. Wheeler, 16 Id. 106.

[3] Buffum v. Green, 5 N. H. 71; Tillou v. Britton, 4 Hals. 120; Stover v. Herrington, 7 Ala. 142; Ford v. Williams, 3 B. Mon. 550; Ex parte Conway, 4 Ark.

ency has been established, partaking of the character of a bankrupt law, a payment in money by an insolvent debtor, of a debt due a particular creditor, has been held valid.[1] And in Louisiana, where the fundamental law of the State declares all the property of the debtor to be the common pledge of his creditors, and the courts have always been jealous of any conveyance or transaction calculated to defraud creditors, or give an unjust preference to one class

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302; Powles v. Dilley, 2 Md. Ch. Dec. 119; Edrington v. Rogers, 15 Tex. 188, 195; Sibley v. Hood, 3 Mo. [206] 290; Richards v. Levin, 16 Id. 596; Sedgwick, J., in Hatch v. Smith, 5 Mass. 42, 49; Parsons, C. J., in Widgery v. Haskell, Id. 144, 157; Wilde, J., in Johnson v. Whitwell, 7 Pick. 71, 73; Dewey, J., in Nostrand v. Atwood, 19 Id. 281, 284; Wing, P. J., in Hollister v. Loud, 2 Mich. 309, 315; Hauselt v. Vilmar, 43 N. Y. Super. Ct. 574; s. c. 2 Abb. N. C. 222; affi'd 76 N. Y. 630. Where a debtor owes two parties, one of them may accept payment of his debt in anything of value he can get, though he knows that the debtor owes the other party and cannot pay both. Hopkins v. Beebe, 26 Penn. St. 85; Archer v. O'Brien, 7 Hun, 146; Lampson v. Arnold, 19 Iowa, 480; The York County Bank v. Carter, 38 Penn. St. 446.

[1] Wall v. Lakin, 13 Metc. 167. The decision in this place was placed on the ground that the case of payment, in money, of an existing debt, by an insolvent debtor, is not among the cases embraced within the provisions of § 3 of the statute of 1841, c. 124. Such a case would have been within the statute of 1838, c. 163, § 10, but is thought by the court to have been designedly omitted in the statute of 1841. The following remarks of Mr. Justice Dewey have an important bearing on the principle considered in the text: "It was strongly urged upon us, at the argument, that it was against the whole policy of the insolvent laws thus to allow a payment to an individual creditor to be retained by him to his own use. If we look merely at the principle of equitable distribution of the whole assets among all the creditors *pro rata*, it would seem to be in derogation of that principle. But there are other considerations favoring the construction we have given. A different rule might be found to operate with great practical inconvenience in its application to payments made in the usual course of business. Many cases occur of traders and other persons who do business while there is a strong public impression that if their debts were at once all demanded there might not be assets sufficient to pay them, yet who continue to pay such debts as are most strongly pressed, hoping to survive their embarrassments, and by better success in business eventually to discharge their entire indebtedness. Whether it would be sound policy to disturb such payments may certainly be somewhat questionable." 13 Metc. 171, 172. It has since been provided by statute, that any payment made by a debtor, being insolvent or in contemplation of insolvency, within six months before the filing of the petition in insolvency by or against him, with a view, directly or indirectly, to give a preference to any pre-existing creditor, or to any person having any pre-existing claim or demand against him, or to any person liable as indorser, guarantor, or surety for him, shall be, as to the other creditors, void; and the assignees in insolvency may recover from the person so preferred the money so paid, with interest, provided such person, when accepting such preference, had reasonable cause to believe such debtor insolvent. Act of June 9, 1756, § 25; Stat. of 1856, c. 284; Gen. Stat. of Mass. c. 118, § 89; Pub. Stat. (1882), p. 894. But the act does not apply to any payment (not exceeding twenty-five dollars in amount) upon any debt contracted for necessaries furnished to the debtor or his family. Id. Ibid.

over another, payments on the eve of insolvency, in the ordinary course of business, have been sustained.[1]

§ 161. *Methods of Giving Preference.*—But an insolvent debtor may exercise this right of preference, not only in the form of the actual *payment of money* to a particular creditor, but also in the form of the assignment or appropriation of *property.*[2] And this, again, may be done by either of the following methods: first, by the transfer of property *directly* to the creditor, either (1) absolutely, in lieu of payment, and as a satisfaction of the debt so preferred;[3] or, (2) conditionally, or by way of security, as by

[1] Garland, J., in The United States v. The Bank of the United States, 8 Rob. (La.) 362, 404.

[2] Garr v. Hill, 1 Stock. 210; Curtis, J., in Heydock v. Stanhope, 1 Curt. 474; Uhler v. Maulfair, 28 Penn. St. 481; Glen v. Grover, 8 Md. 212; Powles v. Dilley, 2 Md. Ch. Dec. 119; Cooper v. McClun, 16 Ill. 435; Wright v. Linn, 16 Tex. 34; Gassett v. Wilson, 3 Fla. 235. A debtor in failing circumstances may give a preference to one or more of his creditors, to the exclusion of others; and such disposition of his effects is not impeachable on the ground of fraud, even though it embraces all his property. Cason v. Murray, 15 Mo. 378. A debtor in failing circumstances may convey all his property to a *bona fide* creditor at an adequate price, even though the known effect of such sale and conveyance may be to delay or defeat his other creditors. Young v. Dumas, 29 Ala. 60; see Pulliam v. Newberry, 41 Id. 168; Harkins v. Bailey, 48 Id. 377.

[3] Parsons, C. J., in Widgery v. Haskell, 5 Mass. 144, 153; Dewey, J., in Nostrand v. Atwood, 19 Pick. 281, 284; Sandford, C., in Mackie v. Cairns, Hopk. Ch. 373, 406. He may assign all or any part of his effects, in satisfaction of a *bona fide* debt, in exclusion of all other creditors. Tilghman, C. J., in The United States v. King, Wall. Sr. 13, 21; Lawrence v. Davis, 3 McLean, 177; Ford v. Williams, 3 B. Mon. 550; Bennett, J., in Hall v. Denison, 17 Vt. 310, 315; Stover v. Herrington, 7 Ala. 142; Bruce's Adm'rs v. Smith, 3 Harr. & J. 499; Hickley v. The Farmers' & Merchants' Bank, 5 Gill & J. 377; Eastman v. McAlpin, 1 Kelly, 157; King v. Trice, 3 Ired. Eq. 568; Gaston, J., in Hafner v. Irwin, 1 Ired. L. 490; Powers v. Green, 14 Ill. 38; Little v. Eddy, 14 Mo. 160; Kuykendall v. McDonald, 15 Id. 416; Edrington v. Rogers, 15 Tex. 188; Hancock v. Horan, Id. 507; Paige, J., in Curtis v. Leavitt, 15 N. Y. 197. A conveyance of land by an insolvent debtor to a creditor, to pay an existing debt, though the parties intend thereby that the claims of other creditors shall be defeated, is not fraudulent. Covanhovan v. Hart, 21 Penn. St. 495; see Lloyd v. Williams, Id. 327. "A debtor in failing circumstances has the right to prefer one creditor to another; and if he takes his property and pays one of his creditors with it, designing at the time, and knowing, that the effect of such payment to the particular creditor will be to prevent some other creditor or creditors from taking his property upon their executions, this will not affect the title of the creditor to whom he has delivered the property." Marvin, J., in Hall v. Arnold, 15 Barb. 599, 600. But see, as to the good faith of the transaction, the observations of Nelson, C. J., in Birdseye v. Ray, 4 Hill, 158, 163; and see Garr v. Hill, 1 Stock. 210, 215; Hancock v. Horan, 15 Tex. 507; Reehling v. Byers, 94 Penn. St. 316; Stamets v. Quinn, 27 N. J. Eq. 383. While a preference must necessarily, to some extent, operate to defer, hinder or delay other creditors, the mere knowledge of the preferred creditor that such will be its effect, and the debtor intended it should

bond, pledge, or mortgage;[1] secondly, by consenting to a transfer by operation of *law*, as by voluntarily confessing a judgment;[2] and thirdly, by transferring property to a third person *in trust*, to hold and dispose of for the benefit of the creditor.[3] By this gradation, we reach that common

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have that effect, will not be sufficient to avoid the transaction as to a creditor not preferred. But if it further appears "that the preferred creditor was not acting from an honest purpose to secure the payment of his own debt, but from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit, he will not be protected, and the sale (to preferred creditors) would be fraudulent as to other creditors, because, in such cases the fraud of the debtor becomes the fraud of the preferred creditor because of his participating therein." Shelley v. Boothe, 73 Mo. 74; Frazer v. Thatcher, 49 Tex. 26.

[1] Stevens v. Bell, 6 Mass. 339; Wilde, J., in Johnson v. Whitwell, 7 Pick. 71, 73; Dewey, J., in Nostrand v. Atwood, 19 Id. 284; Bates v. Coe, 10 Conn. 280; Pomeroy v. Manin, 2 Paine, 476; Waters v. Comly, 3 Har. (Del.) 117; Anderson v. Tydings, 3 Md. Ch. Dec. 167; Davis v. Anderson, 1 Kelly, 176; Nelson, C. J., in Birdseye v. Ray, 4 Hill, 158, 163; Paige, J., in Curtis v. Leavitt, 15 N. Y. 197; Redfield, C. J., in Mussey v. Noyes, 26 Vt. 462, 471; Giddings v. Sears, 115 Mass. 505; Isham, J., in Peck v. Merrill, Id. 686, 693; Leitch v. Hollister, 4 N. Y. 211; Livermore v. McNair, 34 N. J. Eq. 478 (see the case under § 165). A creditor has a right to secure himself by obtaining a lien on the property of a failing debtor, and if done fairly, he may thus obtain a preference over other creditors. Caldwell, J., in Fassett v. Traber, 20 Ohio, 540, 545; see Wiley v. Knight, 27 Ala. 336.

The fact that, pending a contemplated assignment, a mortgage was executed in good faith to secure a pre-existing debt, which mortgage had long previously been promised by the debtor, does not show that the assignment was executed with the intention of hindering, delaying and defrauding creditors, nor does it render the assignment void. Dodd v. Hills, 21 Kan. 707. But this right has been abridged by statute in some of the States. See *post*, pp. 220 *et seq.*

[2] Williams v. Brown, 4 Johns. Ch. 682; Wilder v. Winne, 6 Cow. 284; Blakey's Appeal, 7 Barr, 449; Guy v. McIlree, 26 Penn. St. 92; see Livermore v. McNair, 34 N. J. Eq. 478; see the case under § 165. In the English case of Holbird v. Anderson (5 Term R. 235), where a debtor preferred a creditor by confessing a judgment to him, under which execution was issued and levied, even after judgment obtained and execution issued by another creditor, the preference was held to be not fraudulent under the statute of 13 Eliz. c. 5. But in New Jersey, judgments confessed for the purpose of preferring creditors, are within the act declaring all preferences fraudulent and void. Rev. Stat. (ed. 1878), p. 36. In Maryland, judgments confessed by a debtor, with a view or under an expectation of applying for the benefit of the insolvent laws, and for the purpose of preferring a creditor or surety, are declared void. Holcomb's Law of Debtor and Creditor, 298; and in Louisiana, the confession of judgment by a debtor within three months next preceding his failure, in order to give an unjust preference to one or more of his creditors over the others, is required to be declared null and void. Rev. Stat. (ed. 1870), p. 359, § 1808. And in Kentucky, by act of March 8, 1862, every judgment which shall be suffered by a defendant in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion in whole or in part of others, shall operate as a general assignment for the benefit of all creditors ratably. Supplement to Rev. Stat. (1866), p. 239; Gen. Stat. (1881), p. 490.

[3] Stevens v. Bell, 6 Mass. 339; Dewey, J., in Nostrand v. Atwood, 19 Pick. 284.

form of voluntary assignment by which a debtor transfers the *whole* of his property to a trustee, to be applied for the benefit of certain creditors, or in which he classifies his creditors, and directs his trustee to pay them in a certain prescribed *order*.

§ 162. *Preferences by Direct Transfer.*—The right of a debtor in embarrassed or failing circumstances to provide for particular creditors by appropriations out of property of which he himself retains the dominion, or, in other words, the right to prefer by the *direct transfer* of property to the creditor preferred, rests in a great degree on the necessities of mercantile business,[1] and is conceded even in those judicial opinions which deny or condemn the exercise of the right in the indirect form of a trust.[2] The mere preference thus given is nothing more than what the law itself constantly allows and secures to one creditor over another as the reward of superior vigilance and diligence in the prosecution and enforcement of his remedies. The priority everywhere given to a creditor who obtains a *judgment* over other creditors equally meritorious, is a familiar example of this preference by law. On the same ground rested the priority given in New York to creditors proceeding under the "act to abolish imprisonment for debt and to punish fraudulent debtors,"[3] and in other States to attaching creditors, and in all these cases the preference is one which cannot be divested by the debtor, even by an assignment of all his property for the benefit of all his creditors.[4] The exercise of the right to prefer in this direct form, especially where the ap-

[1] See the observations of Coulter, J., in Blakey's Appeal, 7 Barr, 449, 451, and of Ford, J., in Tillou v. Britton, 4 Hals. 128, 136.

[2] See the opinion of Nelson, J., in Cunningham v. Freeborn, 11 Wend. 240, 256; and of Sutherland, J.. in Grover v. Wakeman, Id. 194, 201. In Atkinson v. Jordan, 5 Ohio, 178, Wright, J., observed, "It seems admitted that a debtor in failing circumstances may, in good faith, pay one creditor in money or goods in preference to another, but the frequent abuses practiced in transfers to effect a preference by means of *trusts* instead of actual payment has led many to doubt the policy of holding such transfers valid."

[3] This act is now repealed.

[4] Wood v. Bolard, 8 Paige, 556; Spear v. Wardell, 1 N. Y. 144; see Hall v. Kellogg, 12 N. Y. 325; Wilde, J., in Johnson v. Whitwell, 7 Pick. 71, 75; Story, J., in Halsey v. Whitney, 4 Mason, 206, 218.

propriations made by it are limited and partial, leaving the residue of the debtor's property open to the legal pursuit of his creditors, does not affect the right of unpreferred creditors to proceed against such residue, nor does it necessarily hinder or delay them in the prosecution of their legal remedies. Hence we find it admitted in the jurisprudence of those States where preferences by general assignments, in trust, are expressly or in effect prohibited by statute; as in New Hampshire,[1] Connecticut,[2] New Jersey,[3] Pennsylvania,[4] Iowa,[5] Alabama,[6] Missouri,[7] California,[8] and Ohio.[9]

§ 163. *Preferences in Assignments to Trustee.*—But

[1] Meredith Manuf. Co. v. Smith, 8 N. H. 347; Law v. Wyman, Id. 536; Barker v. Hall, 13 Id. 298; so, formerly, in Massachusetts. Henshaw v. Sumner, 23 Pick. 446; Brown v. Foster, 2 Metc. 152; Danforth v. Denny, 25 N. H. 155. But see the statutes of 1838, 1841 and 1856, referred to *post*, p. 229, n. 7.

[2] Bates v. Coe, 10 Conn. 280; Pomeroy v. Manin, 2 Paine, 476. But see the act of 1853: Rev. Stat. (ed. 1875), p. 378.

[3] Tillou v. Britton, 4 Hals. 120, 121; Garr v. Hill, 1 Stock. 210. 215.

[4] Blakey's Appeal, 7 Barr, 449; Worman v. Wolfersberger's Ex'rs, 19 Penn. St. 59; Uhler v. Maulfair, 23 Id. 481; York Co. Bank v. Carter, 38 Id. 446; Guy v. McIlroe, 26 Id. 92; see Wilson v. Berg, 38 Id. 167. Under the act of April 16, 1849, § 4, judgments confessed to evade the act of 1843, followed by an assignment of real estate, were held to be void as against other creditors, and not entitled to preference out of the proceeds of sale of such real estate, but entitled only to a *pro rata* payment with the other debts of the debtor. Summers' Appeal, 16 Penn. St. 169. And if the debtor, at the time of confessing the judgment, knew that he was insolvent, his subsequent execution of the assignment was held to be conclusive evidence that the judgments were given in fraud of the act of 1843. Id. ibid. But the act of 1849 was repealed, so far as related to judgments, by the act of May 4, 1853, § 5. Laws of 1852, p. 584; Purdon's Digest, p. 91, and notes. But independent of the statute, the decision in Summers' Appeal, *supra*, was overruled on authority in Hutchinson v. McClure, 20 Penn. St. 63; and see, as to partial assignment in trust, Miners' Nat. Bank Appeal, 57 Penn. St. 193.

[5] Fromme v. Jones, 13 Iowa, 474; Davis v. Gibson, 24 Id. 257; Farewell v. Howard, 26 Id. 381; Lampson v. Arnold, 19 Id. 480. In Van Patten v. Burr, 52 Id. 518, it was held that an assignment giving preferences was none the less invalid because it consisted of several instruments. The statute does not prevent the insolvent at the time he executes the assignment from paying certain creditors while he retains the *jus disponendi* of his property, but simply limits his right to prefer where he makes a general assignment.

[6] Young v. Dumas, 29 Ala. 60; Pulham v. Newberry, 41 Id. 168; Harkins v. Bailey, 48 Id. 377.

[7] Cason v. Murray, 15 Mo. 378; Johnson v. McAllister's Assignee, 30 Id. 327; State v. Benoist, 37 Id. 500.

[8] Civil Code of California, §§ 34, 51, expressly provides that the provisions of the act shall not affect the power of a person, although insolvent, to transfer property to a particular creditor for the purpose of paying or securing the whole or a part of a debt owing to such creditor, whether in his own right or otherwise.

[9] Wilcox v. Kellogg, 11 Ohio, 394; Hulls v. Jeffrey, 8 Id. 390.

where an insolvent debtor, instead of retaining the dominion of his property, divests himself of it by a general assignment *to a trustee*, with directions to the latter to apply it in satisfaction of certain specified debts, to the exclusion or postponement of others, he places the rights of unpreferred creditors on quite a different and much less favorable footing. Deprived by such a transfer of all remedy against the property except where the assignment can be avoided as fraudulent or illegal, they are compelled to await the uncertain result of the execution of the trust in its due course, with all the delays necessarily attendant on the processes of collection, sale, and distribution by the assignee, and are effectually turned over to the remote chances of sharing in a possible surplus remaining after full satisfaction of the claims preferred. The temptations to the abuse or inequitable exercise of the right of preference itself in this form, and the facilities for reserving undue advantages to the debtor, through the services of a friendly trustee, are other evils attending the unrestricted allowance of the right to favor one creditor at the expense of another through the medium of this description of conveyance. Hence, the policy of the rule allowing preferences in general assignments to trustees has frequently been questioned by high authority in this country, as conferring a power which may be easily abused and rendered subservient to fraud, and the practice itself has been pointedly condemned as calculated to create confusion, uncertainty and collusion.[1]

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[1] In the case of Riggs v. Murray (2 Johns. Ch. 565, 577), Chancellor Kent described the operation of the rule in the following terms: "As we have no bankrupt system, the right of the insolvent to select one creditor and to exclude another is applied to every case, and the consequences of such partial payments are extensively felt and deeply deplored. Creditors out of view and who reside abroad or at a distance, are usually neglected. This checks confidence in dealing, and hurts the credit and character of the country. These partial assignments are, no doubt, founded in certain cases upon meritorious considerations, yet the temptation leads strongly to abuse and to the indulgence of improper motives" In Cunningham v. Freeborn (11 Wend. 240, 256), Mr. Justice Nelson expressed his disapprobation in still stronger language. "The root of the vice, in all these cases of voluntary assignments, lies in the principle of *preference*. It affords the pretense for putting the property into the possession of a friendly trustee, and thereby may substantially secure to the debtor the control of it for a long time after the law presumes

§ 164. Notwithstanding these objections, however, the right to give preferences to creditors in deeds of assignment to trustees, has, in cases not within the bankrupt law, been freely admitted, nay, justified, by the courts in England,[1]

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it to have passed from him, and when his own possession would be incompatible with its security." In Burd v. Smith (4 Dall. 76), decided when preferences were allowed in Pennsylvania, though the court admitted the right, Mr. Justice Breckenridge condemned the practice in the following terms: "The right has been allowed, perhaps on a principle of humanity, or in favor of just debts, to exclude debts in law not strictly *ex debito justitiæ*. But I do not think that the practice should be encouraged. It is calculated to create confusion, uncertainty, and collusion." Id. 88. In Pingree v. Comstock (18 Pick. 46, 51), decided before preferences were exhibited in Massachusetts, Mr. Justice Wilde observed: "It is to be regretted that an insolvent debtor has the power to make any preferences. It is a power which may be grossly abused, and ought not to be extended or encouraged." In Atkinson v. Jordan (5 Ohio, 178), Mr. Justice Wright described the operation of the rule in Ohio, while preferences were allowed in that State, as follows: "The practice among speculating traders of shattered and desperate circumstances, of accumulating property upon credit with a desire of securing the means of satisfying the claims of confidential creditors, who contribute in various ways to keep up the credit upon which the property has been procured, and then passing these effects so procured into the hands of trustees, to be protected from legal process, and to be exhausted in satisfying those preferred claims, leaving all creditors without a farthing, can hardly be justified on any sound, moral or legal principle. Instances are frequent of merchandise procured from an honest trader, on credit, being handed over in bulk to trustees, to secure indorsers and other confidential creditors. Equity delights in equality, and it is becoming a grave question whether courts of justice should longer countenance a sinking debtor in preferring one creditor to another in the distribution of his effects." Id. See, also, the observations of Hinman, J., in Beers v. Lyon, 21 Conn. 610; of Woods, J., in Barker v. Hall, 18 N. H. 301; of Isham, J., in Peck v. Merrill, 26 Vt., 686, 692; and of Pratt, J., in Pierson v. Manning, 2 Mich. 445, 448. The preamble to the Georgia statute of December 19, 1818, prohibiting preferences in general assignments, is in the following words: "Whereas, a practice of selecting particular creditors by assignments and transfers of property, made by persons indebted, and thereby excluding or defrauding other *bona fide* creditors of their just claims on the estate of insolvent debtors, is *contrary to the first principles of equity and justice;* to prevent the mischief thereof, Be it enacted," &c. See also the observations of Roosevelt, J., in Nichols v. McEwen, 17 N. Y. 22; of Fairchild, J., in Hull v. Roane, 22 Ark. 184.

[1] In the case of Estwick v. Caillaud (5 Term R. 420), where a debtor had assigned a portion of his property in trust for the benefit of certain creditors, Lord Kenyon, in sustaining the conveyance, observed that "it was neither illegal nor immoral to prefer one set of creditors to another;" and that even under the bankrupt law, a trader might, by a partial assignment, give a preference, in some respects, to his creditors. Id. 428. In the same case, Ashurst, J., said, "Where the bankrupt laws do not interfere, a debtor may give a preference to particular creditors." Id. 425. And in Nunn v. Wilsmore (8 Term R. 521), where the debtor had conveyed all his effects in trust for the benefit of creditors, Lord Kenyon, in pronouncing the assignment good, remarked that, "putting the bankrupt law out of the case, a debtor may assign all his effects for the benefit of particular creditors." Id. 425. And such preference by a creditor has not only been conceded, but, in some of the older cases, justified. Thus, it was said by the master of the rolls, in Small v. Oudley (2 P. Wms. 427), "There may be just reason for a sinking trader to give a preference to one creditor before another; to one that has been a faithful friend, and for a just debt lent him in

and repeatedly recognized by the federal and State courts of the United States. So that it may be laid down as a general rule that, in the absence of any statutory prohibition and of a bankrupt law, a debtor may, at any time before liens have attached upon his property, make a general or partial assignment to a trustee for the benefit of his creditors, with preferences; which assignment will be valid as against the process of creditors, from the time of the execution of the deed.[1] "He may" observed Mr. Justice Sutherland, in

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extremity, when the rest of his debts might be due from him as a dealer in trade, wherein his creditors may have been the gainers; whereas the other may be not only a just debt, but all that such creditor has in the world to subsist upon; in this case (I say), and so circumstanced, the trader honestly may, nay *ought* to give the preference." Id. 429. Similar views were taken by Lord Chancellor Parker, in Cock v. Goodfellow (10 Mod. 489). So, in the United States, in Burd v. Smith (4 Dal. 76, 86), Smith, J., observed that cases may be easily conceived in which the giving of a preference "would be a *duty*." And in Murray v. Riggs (15 Johns. 571, 585), Thompson, C. J., said, "I think I may assume it as a settled and unshaken principle, both at law and in equity, that a failing debtor has a *just*, legal and *moral* right to prefer, in payment, one creditor, or set of creditors, to another."

[1] 1 American Leading Cases (Hare & Wallace's notes), 95 [65, ed. 1857]; 2 Kent's Com. [532] 689; Marbury v. Brooks, 7 Wheat. 556; Spring v. S. Carolina Ins. Co. 8 Id. 268; Brooks v. Marbury, 11 Id. 78; Brashear v. West, 7 Pet. 608, 614; Clark v. White, 12 Id. 178; Tompkins v. Wheeler, 16 Id. 106; Pearpoint v. Graham, 4 Wash. C. C. 232; United States v. King, Wall. Sr. 18, 21; Halsey v. Whitney, 4 Mason, 206, 212, 218; Lawrence v. Davis, 3 McLean, 177; Curtis, J., in Stewart v. Spenser, 1 Curt. 157, 162; Kent, C., in Hendricks v. Robinson, 2 Johns. Ch. 283, 306; Van Ness, J., in McMenomy v. Ferrers, 3 Johns. 71, 84; Wilkes v. Ferris, 5 Id. 335; Vanness, J., in Hyslop v. Clarke, 14 Id. 458, 463; Thompson, C. J., in Murray v. Riggs, 15 Id. 571, 583; Mackie v. Cairns, 5 Cow. 547; Wintringham v. Lafoy, 7 Id. 735; Grover v. Wakeman, 11 Wend. 187; Jacobs v. Remsen, 36 N. Y. 668; Putnam v. Hubbell, 42 N. Y. 106; Webb v. Daggett, 2 Barb. S. C. 9; Brigham v. Tillinghast, 15 Id. 618; Burd v. Smith, 4 Dall. 85 n.; Smith, J., Id. 86; Wilt v. Franklin, 1 Binn. 502, 514; Lippincott v. Barker, 2 Id. 174; Cameron v. Montgomery, 13 Serg. & Rawle, 128; Wilson v. Berg, 88 Penn. St. 167; De Forest v. Bacon, 2 Conn. 633; Ingraham v. Wheeler, 6 Id. 277; Hatch v. Smith, 5 Mass. 42; Widgery v. Haskell, Id. 144, 153; Russell v. Woodward, 10 Pick. 407; Foster v. Saco Manufacturing Co. 12 Id. 451; Nostrand v. Atwood, 19 Id. 281; Pierce v. Jackson, 2 R. I. 35; Beckwith v. Brown, Id. 311; Dockray v. Dockray, Id. 547; Nightingale v. Harris, 6 Id. 321; Allen v. Gardner, 7 Id. 22; Buffum v. Green, 5 N. H. 71; Haven v. Richardson, Id. 113; Hall v. Denison, 17 Vt. 310; Redfield, C. J., in Mussey v. Noyes, 26 Vt. 462, 471; Canal Bank v. Cox, 6 Greenl. 395; Tillou v. Britton, 4 Halst. 120; Atkinson v. Jordan, 5 Ohio, 178; Hickley v. The Farmers' & Merchants' Bank, 5 Gill & J. 377; State of Maryland v. Bank of Maryland, 6 Id. 205; Cole v. Albers, 1 Gill, 412; McCall v. Hinckley, 4 Id. 128; Beatty v. Davis, 9 Gill, 211; Sangston v. Gaither, 3 Md. 40; Maennel v. Murdock, 13 Id. 164; McColgan v. Hopkins, 17 Id. 395; McCullough v. Somerville, 8 Leigh, 415; Skipwith's Ex'r v. Cunningham, Id. 271; Phippen v. Durham, 8 Gratt. 457; Dance v. Seaman, 11 Id. 778; Gordon v. Cannon, 18 Gratt. 388; Moffatt v. McDowall, 1 McCord's Ch. 434; Moore v. Collins, 3 Dever. 126; Hafner v. Irwin, 1 Ired. L. 490; Alle-

Grover v. Wakeman,[1] "assign the whole of his property for the benefit of a single creditor, in exclusion of all others, or he may distribute it in unequal proportions, either among a part or the whole of his creditors. No matter how or upon what principles the distribution is made, if the debtor devotes the whole of his property to the payment of just debts, neither law nor equity inquires whether the objects of his preference are more or less meritorious than those for whom he has made no provision. The right to prefer may originally have been sustained, in part, upon the supposition that just and proper grounds of preference did, in most cases, exist, and would be duly regarded by the debtor; but whatever may have been the reason or foundation of the rule, it is one of that numerous class of cases in which the rule has become absolute, without any regard to the fact whether the reason on which it was founded exists or not in the particular cases. It is now too late to agitate the question whether these assignments, either partial or general, are sustained by considerations of true wisdom and policy. Reflecting men have differed upon that subject; but the better opinion seems to be that, in the absence of a general bankrupt system, the interests of a commercial community require that

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mand v. Russell, 5 Ired. Eq. 188; Smith v. Campbell, Rice, 353; Niolon v. Douglass, 2 Hill's Ch. 443; Eastman v. McAlpin, 1 Kelly, 167; Cameron v. Scudder, Id. 204; Bellamy v. Bellamy's Adm'r, 6 Fla. 62; Holbrook v. Allen, 4 Fla. 87, 92; Robinson v. Rapelye, 2 Stew. 86; Richards v. Hazard, 1 Stew. & Port. 189; Williams v. Jones, 2 Ala. 314; Hindman v. Dill, 11 Id. 689; Rankin v. Loder, 21 Id. 380; Sharkey, C. J., in Brown v. Bartee, 10 Sm. & M. 268, 274; Layson v. Rowan, 7 Rob. (La.) 1; McQuinnay v. Hitchcock, 8 Texas, 33; Edrington v. Rogers, 15 Id. 188, 195; Wright v. Linn, 16 Id. 34, 42; Vernon v. Morton, 8 Dana, 247; Pearson v. Rockhill, 4 B. Mon. 296; Marshall v. Hutchinson, 5 Id. 305; Ramsdell v. Sigerson, 2 Gilm. 73; Cross v. Bryant, 2 Scam. 37; Howell v. Edgar, 3 Id. 417; How v. Camp, Walk. 427; Hollister v. Loud, 2 Mich. 309, 314; Bell v. Thompson, 3 Mo. [61] 84; Sibley v. Hood, Id. [206] 290; Cason v. Murray, 15 Id. 378; Gamble, J., in Richards v. Levin, 16 Id. 596, 598, 599; Ex parte Conway, 12 Ark. 302; Hoff v. Roane, 22 Id. 184; Hempstead v. Johnson, 18 Id. 123; Bailey v. Mills, 27 Tex. 434; Rowland v. Coleman, 45 Ga. 204; Lay v. Seago, 47 Id. 82; Tomlinson v. Matthews, 98 Ill. 178; Reed v. McIntyre, 98 U. S. 507; Hauselt v. Vilmar, 76 N. Y. 630; affi'g 48 Super. Ct. 574; s. c. 2 Abb. N. C. 222; Mayer v. Hellman, 91 U. S. 496. The cases above cited embrace the decisions of the highest courts in almost every State of the Union. It will be seen, however, from the text, that in some of these States the right to prefer has latterly been either wholly taken away, or more or less modified by statute.

[1] 11 Wend. 187, 194, 197.

they should be sustained. They have accordingly grown into use, and have been sanctioned by judicial decisions in most of the States of the Union. They have become thoroughly incorporated into our system; and all that it is now competent for our courts to do, is to see that they fairly appropriate all the insolvent's property, or such portion of it as he undertakes to assign, to the payment of his just debts, and are not made the instruments of placing it beyond the reach of his creditors, and for the benefit, either immediate or remote, of the insolvent himself."[1]

§ 165. *Restrictions on the Right to Prefer*—The remarks here quoted continue to be fully applicable to the present law of assignments in the State of New York. "It is now entirely settled in this State," observed Mr. Justice Harris, in the case of Webb v. Daggett,[2] "that a debtor in failing circumstances may assign his property in trust for his creditors, and give such preference among them as he may choose." It is true, also, that assignments of this character have heretofore been in constant use, and as constantly sustained in most of the United States, and that, at common law, the right to prefer cannot be questioned.[3] Of late, however, the tendency has been towards a restriction of the exercise of this right on the part of insolvent debtors; and in several of the States, statutes have been passed declaring assignments with preferences, or such as provide for an unequal distribution of the debtor's property, to be either absolutely void, or to inure to the equal benefit of all the creditors. Thus, in California,[4] Colorado,[5] Connecticut,[6] Dela-

[1] And see, to the same effect, the observations of Gaston, J., in Hafner v. Irwin, 1 Ired. L. 490; of Allen, P., in Dance v. Seaman, 11 Gratt. 780, 781; and of Wing, P. J., in Hollister v. Loud, Mich. 309, 315.

[2] 2 Barb. S. C. 9. And see the observations of Duer, J., in Nicholson v. Leavitt, 4 Sandf. S. C. 252, 282.

[3] Tilghman, C. J., in United States v. King, Wall. Sr. 18, 21; Lawrence v. Davis, 3 McLean, 177; Beatty v. Davis, 9 Gill, 211; Redfield, C. J., in Mussey v. Noyes, 26 Vt. 462, 471.

[4] Civil Code of California, tit. 3, part 2, § 3457. [5] Laws of 1881, p. 35.

[6] General Statutes of Connecticut (Rev. of 1875), p. 378, § 1. See Goodell v. Williams, 21 Conn. 419; Beers v. Lyon, Id. 604.

ware,[1] Iowa,[2] Kansas,[3] New Hampshire,[4] Michigan,[5] and Missouri,[6] general assignments giving preferences are declared fraudulent and void. In Massachusetts,[7] assignments, whether with or without preferences, are equally voidable by creditors not parties to them. In Maine,[8] every assignment made for the benefit of creditors is required to provide for a proportional distribution of all the real and personal estate of the debtor, except what is exempt from attachment, among all the creditors becoming parties thereto; and in whatever form made, or however expressed, is declared to have the same effect. In Vermont,[9] all assignments are required to be for the benefit of all the creditors of the assignor, in proportion to their respective claims, anything in such assignments to the contrary notwithstanding. In Illinois,[10] preferences are void, and all debts within the provisions of the assignment are to be paid *pro rata*. In Minnesota,[11] stringent provisions are made against preferences, and a confession of judgment, with in-

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[1] Revised Code of Delaware (ed. 1874), c. 132, § 6.

[2] Code of Iowa (ed. 1880), title 14, c. 7, § 2115. See end § 162.

[3] General Statutes (ed. 1868), c. 6, § 1, p. 98; Comp. Laws (1879), p. 99.

[4] General Laws (ed. 1878), c. 140, § 1, p. 335; True v. Congdon, 44 N. H. 48.

[5] Laws of 1879, c. 198; Laws of 1881, c. 278; see Pierson v. Manning, 2 Mich. 445.

[6] General Statutes of Missouri (ed. 1879), vol. I, c. 5, p. 54.

[7] See *post*, p. 229.

[8] Revised Statutes of Maine (ed. 1871), p. 543. The former act of April 1, 1836 (3 Laws of Me. 550, c. 761), prohibited preferences. Pike v. Bacon, 21 Me. 280. But the assignment is void only in behalf of creditors who become parties to the assignment. Hanscom v. Buffum, 66 Me. 246.

Under the act of 1844, preferences given in the act of assignment or in the transaction by which the distribution is effected, if the assignment is a part thereof, are in violation of the statute; though the preferences may not be shown in the assignment itself, they may be shown by proof *aliunde*. Berry v. Cutts, 42 Me. 445. See § 23.

[9] Act of November 14, 1855, § 1; Laws of 1855, p. 15; Gen. Stats. (1870), p. 454, § 1; Passumpsic Bank v. Strong, 42 Vt. 295. General assignments were formerly prohibited. Mussey v. Noyes, 26 Vt. 462; Noyes v. Hickok, 27 Id. 36; Merrill v. Englesby, 28 Id. 150; Bishop v. Catlin, 28 Id. 71; Fair v. Brackett, 30 Id. 344.

[10] R. S. of Ill. (Cothran, 1881), p. 121, § 13; see Cross v. Bryant, 3 Ill. 37; Blow v. Gage, 44 Id. 208; Tomlinson v. Matthews, 98 Id. 178; Lill v. Brant, 6 Ill. App. (Bradw.) 366.

[11] Laws of 1881, c. 148.

tent that one of the creditors should obtain a preference, is made a misdemeanor, punishable by fine or imprisonment. In Nebraska,[1] assignments giving preferences (except for the payment of wages of labor) are declared to inure to the benefit of creditors ratably. In Rhode Island,[2] preferences are not allowed except in certain cases. In Tennessee,[3] preferences are illegal and void, but do not render the assignment itself invalid which inures to the benefit of all creditors *pro rata*, whether mentioned or not.

In New Jersey,[4] all assignments in trust for the benefit of creditors are expressly required to be made for their equal benefit, in proportion to their several demands; and all preferences of one creditor over another, or whereby any one or more shall be first paid, or have a greater proportion in respect of his claim than another, excepting mortgage and judgment creditors (when the judgment has not been by confession, for the purpose of preferring creditors), are to be deemed fraudulent and void. In Pennsylvania,[5] all assignments of property in trust, which shall be made by

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[1] 1 Compiled Laws (1881), c. 6.

[2] Pub. L. of R. I. (ed. 1881), p. 657; for the exceptions see § 30 a, and notes; see Pearce v. Jackson, 2 R. I. 35; Beckwith v. Brown, Id. 311; Dockray v. Dockray, Id. 547; Nightingale v. Harris, 6 Id. 321; Allen v. Gardner, 7 Id. 22.

[3] Laws of 1882, p. 154; see Galt v. Dibrel, 10 Yerg. 140; Rindskoff v. Guggenheim, 3 Cold. (Tenn.) 284.

[4] Rev. Stat. (ed. 1878), p. 36; Varnum v. Camp (13 N. J. L.), 1 Green, 326; Brown v. Holcomb, 1 Stock. 297; Tillou v. Britton, 9 N. J. L. 121; see note 2, p. 39. A. executed a mortgage to three of his creditors to secure certain notes, and also confessed judgment to a creditor, under which his personal property was sold, and bought by one of the three creditors, and transferred by him to the wife of A., upon her executing a chattel mortgage for the full amount of the purchase money. The object of the mortgage and judgment was to prevent the sale of the property, so that A. might, from its advance in value and the profits of his business, be able to pay all his creditors in full. *Held*, that the mortgage and judgment violated both the statute regulating assignments and the statute of frauds; that a preference was given, and the creditors were prevented from having the property applied to the discharge of their debts by due course of law. Livermore v. McNair, 34 N. J. Eq. 478.

By the act of March 15, 1855, Nixon's Dig. (ed. 1868), 87, the wages of clerks, miners, mechanics and laborers, due at the time of making the assignment, are preferred, provided that such preferred debt shall not in any case exceed the sum of three hundred dollars.

[5] Act of April 17, 1843; Laws of 1843, p. 273; Dunlop's Laws (ed. 1847), c. 592, p. 896; Purdon's Dig. (Brightly, 10th ed.) vol. I, p. 90. The preferences which are forbidden in this State are only those given by the assignment itself.

debtors to trustees, on account of inability, at the time of the assignments, to pay their debts, to prefer one or more creditors (except for the payment of wages of labor, the claims for which shall not severally exceed the sum of fifty dollars), are required to be held and construed to inure to the benefit of all the creditors, in proportion to their respective demands.[1] In Ohio,[2] all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, are required to be held to inure to the benefit of all the creditors in proportion to their respective demands;[3] and all transfers, conveyances and assignments made with the intent to hinder, delay and defraud creditors, inure to the equal benefit of all creditors who, after notice, join in the proceeding to fasten a trust upon such fraudulent transfers.[4] In Kentucky,[5] every assignment made by a debtor in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion, in whole or in part, of others, is declared to operate as an assignment and transfer of all such debtor's property

[1] The statute does not avoid such conveyances, but merely expunges the preferences. Wiener v. Davis, 18 Penn. St. 331; Law v. Mills, Id. 185; Miners' Bank Appeal, 57 Id. 198; Driesback v. Becker, 84 Id. 152; Peters v. Light, 76 Id. 289. By the act of April 16, 1849, § 4, any condition in assignments, for the payment of releasing creditors only, is required to be taken as a preference in favor of such creditors, and is declared void. Laws of 1849, p. 664; Purdon's Dig. 92. And see, as to claims for wages to be preferred by assignees, acts of April 2, 1849; April 14, 1851, § 10; April 22, 1854; Purdon's Dig. p. 92. The act of May 4, 1864, provides for the appraisement and exemption of property to the debtor. Purdon's Dig. (Brightley), p. 93, § 17.

[2] See *ante*, p. 40; 1 Rev. Stat. of Ohio (S. & C.), p. 712, § 16; Act of March 14, 1838; 1 Rev. Stat. of Ohio (S. & C.), p. 713; 2 Rev. Stat. of Ohio (ed. 1880), § 6343.

[3] Act of 1859; 1 Rev. Stat. (S. & C.), p. 713; Act of Feb. 12, 1863; Stat. of Ohio (Sayl.), vol. I, p. 354; 2 Rev. Stat. of Ohio (ed. 1880), § 6344; Combs v. Watson, 32 Ohio St. 228.

[4] The statute merely gives such assignments a particular direction; it does not avoid them. Caldwell, J., in Brown v. Webb, 20 Ohio, 389, 400; Doremus v. O'Hara, 1 Ohio St. 45; Floyd v. Smith, 9 Id. 546. For a full statement of the effect of this legislation, see Thomas v. Talmadge, 16 Ohio St. 433.

[5] Act of March 10, 1856; Rev. Stat. of Ky. vol. I, p. 553; Gen. Stat. of Ky. (ed. 1881), p. 490. See, as to the law previous to this statute, Vernon v. Morton, 8 Dana, 247; Reinhard v. Bank of Ky. 6 B. Mon. 252. By section 7 of this act, debts due as guardian or administrator have priority, as also debts due as trustee, if the trust be created by deed or will duly recorded in the proper clerk's office.

and effects, and to inure to the benefit of all his creditors, in proportion to the amount of their respective demands, including those which are future and contingent. And in that State it is also provided that every judgment which shall be suffered by any defendant, or any act or devise which shall be done or resorted to by debtors in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion, in whole or in part, of others, shall in like manner inure to the equal benefit of all creditors.[1] In Alabama, every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, is declared to be and inure to the benefit of all the creditors of the grantor equally.[2] In Missouri,[3] every provision in any assignment providing for the payment of one debt or liability in preference to another is declared to be void; and all debts and liabilities within the provisions of the assignment are required to be paid *pro rata* from the assets. In Louisiana, it is a fundamental rule, that the property of a debtor is the common pledge of his creditors, and its proceeds must be distributed among them ratably, except for lawful causes of preference.[4] In Oregon,[5] assignments are invalid unless made for the benefit of all the creditors in proportion to the amount of their respective claims.

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[1] Act of March 8, 1862; Gen. Stat. (1881), p. 490; see Hampton v. Morris, 2 Metc. (Ky.) 336; Taylor v. Taylor, 78 Ky. (Rodm.) 470.

[2] Code of Ala. (1876), p. 562, § 2126. The act does not avoid the assignment which provides for a preference, but simply declares that it shall inure to the benefit of all the creditors equally. Price v. Mazange, 31 Ala. 701. The statute does not apply to preferences by partial assignments. Holt v. Bancroft, 30 Ala. 195; Stetson v. Miller, 36 Id. 642; Longmire v. Goode, 38 Id. 577; Du Bose v. Carlisle, 51 Id. 590; Murphy v. Caldwell, 50 Id. 461. For the law in regard to preferences before the statute, see West v. Snodgrass, 17 Ala. 549; Branch Bank at Mobile v. Robertson, 19 Id. 798; Colgin v. Redman, 20 Id. 650; Rankin v. Lodor, 21 Id. 380.

[3] Stats. of Mo. (Wagner), p. 150, c. 9, § 1; 1 R. S. c. 5. The act of 1855 prohibiting preferences made in the deed. See Johnson v. McAllister's Assignee, 30 Mo. 327; Shapleigh v. Baird, 26 Mo. 322; and note 1, p. 38; and note to R. S. (1879), p. 54.

[4] Civil Code, art. 3150; see also Rev. Stat. (ed. 1870), p. 360, § 1815.

[5] Laws of 1878, p. 36. Previously, it would seem, preferences were allowed. Kruse v. Prindle, 8 Oregon, 158.

In the States of New York,[1] Maryland,[2] Virginia,[3] North Carolina,[4] South Carolina,[5] Florida,[6] Mississippi,[7] Georgia,[8] Indiana, Wisconsin,[9] Arkansas,[10] and in the Territory of New Mexico,[11] preferences to creditors in general assignments have not been prohibited by statute. In Texas[12] a debtor may make an assignment for the benefit of such of his creditors only as will consent to accept their proportional share of his estate and discharge him from their respective claims. But in most of these States the principle of preference has been regarded with disfavor, and the courts have sustained it with reluctance, and subject to more or less restriction and qualification.

§ 166. *Preferences Regarded with Disfavor.*—In New York, particularly, the inclination of the courts against assignments with preferences has been becoming stronger, and its expression more pointed and emphatic ever since the case

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[1] See *infra*, in the text.

[2] Beatty v. Davis, 9 Gill, 211; Powles v. Dilley, 2 Md. Ch. Dec. 119; see American Exch. Bank v. Inloes, 7 Md. 380; Maennel v. Murdock, 13 Id. 164; McColgan v. Hopkins, 17 Id. 395; Maughlin v. Tyler, 47 Id. 545; Loney v. Bayly, 45 Id. 447; Coakley v. Weil, 47 Id. 277. An assignment giving preferences to those only who will release the debtor within a given time is valid. Mackintosh v. Corner, 33 Md. 598.

[3] 2 Tucker's Com. [443] 432; Burr's Ex'r v. McDonald, 3 Gratt. 215; Reynolds v. The Bank of Va. 6 Id. 174; Dance v. Seaman, 11 Id. 778; see Code of Va. (1873), p. 897, tit. 33, c. 114, § 6; Gordon v. Cannon, 18 Gratt. 388; Miller v. Crawford, 32 Id. 277.

[4] Hafner v. Irwin, 1 Ired. L. 490; see *post*, p. 228; Wiswall v. Potts, 5 Jones' Eq. (N. Ca.) 184.

[5] Smith v. Campbell, 1 Rice, 352.

[6] Bellamy v. Bellamy's Adm'r, 6 Fla. 62; Holbrook v. Allen, 4 Id. 87, 92; Walters v. Whitlock, 9 Id. 86.

[7] Sharkey, C. J., in Brown v. Bartee, 10 Sm. & M. 268, 274; see Lawson v. Rowan, 7 Rob. (La.) 1.

[8] Rowland v. Coleman, 45 Ga. 204; Lay v. Seago, 47 Id. 82. Previous to the act of 1866, preferences were not permitted. Lamb v. Radcliff, 28 Ga. 520; Norton v. Cobb, 20 Id. 44; Banks v. Clapp, 12 Id. 514; Eastman v. McAlpin, 1 Kelly, 157; Cameron v. Scudder, 1 Id. 204.

[9] Ball v. Bowe, 49 Wis. 495.

[10] Ex parte Conway, 12 Ark. 302; Huff v. Roane, 22 Id. 184; Hempstead v. Johnson, 18 Id. 128.

[11] Leitensdorfer v. Webb, 1 N. Mex. 34.

[12] Act of 1879, c. 53, p. 57; R. S. (ed. 1879), appendix, p. 5; see McQuinnay v. Hitchcock, 1 Tex. 33; Edrington v. Rogers, 15 Id. 188, 195; Wright v. Linn, 16 Id. 34, 42; Bailey v. Mills, 27 Id. 434; Frazer v. Thatcher, 49 Id. 26.

of Riggs v. Murray,[1] in the Court of Chancery, in 1817. In that case, Chancellor Kent, while admitting the legality of the rule allowing preferences, observed that its application was "always to be watched with jealousy;" and that the court was not "required by any reasons of expediency or justice, to enlarge the rule by giving it a new and dangerous facility."[2] In the leading case of Grover v. Wakeman,[3] in the Court of Errors, in 1833, it was decided that a debtor in failing circumstances may prefer one creditor or set of creditors, by assigning his property for their benefit, in exclusion of his other creditors; *provided* that he devote the whole of the property assigned to the payment of his just debts—that the assignment be absolute and unconditional—that it contains no reservation or condition for his benefit—and does not extort from the fears or apprehensions of his creditors, an absolute discharge as a consideration for a partial dividend.[4] In the case of Boardman v. Halliday,[5] in the Court of Chancery (1843), Chancellor Walworth characterized the principle of preference as "an erroneous principle, as injurious to the just rights of creditors as it is dangerous to the morals of the community,"[6] and refused to sanction its extension beyond what must be considered as the settled law of the land. In the case of Goodrich v. Downs,[7] in the Supreme Court (1844), Mr. Justice Bronson observed that "the courts have found great difficulty in upholding assignments which give a preference among creditors; and such transfers have only been allowed to stand where the debtor makes an unconditional surrender of his effects for the benefit of those to whom they rightfully belong." In the later case of Webb v. Daggett,[8] in the same court (1847), it was

[1] 2 Johns. Ch. 565. [2] 2 Johns. Ch. 579. [3] 11 Wend. 187.

[4] See the opinion of Mr. Justice Sutherland in this case (11 Wend. 192), from which an extract has already been made (*ante*, p. 218).

[5] 10 Paige, 228.

[6] The chancellor also referred to the opinions of Judge Holman, of the District Court of the United States for Indiana; of Judge Judson, of Connecticut; and of Judges Story and Baldwin of the Supreme Court of the United States, as strongly adverse to the principle.

[7] 6 Hill, 438, 439. [8] 2 Barb. S. C. 9, 11.

said that assignments giving preferences have not ceased to be regarded with jealousy, and that they are rather tolerated than favored.[1] In the case of Barney v. Griffin,[2] in the Court of Appeals (1849), it was remarked by Bronson, J., that "the courts have very reluctantly upheld general assignments by an insolvent debtor, which give a preference among creditors; and they can only be supported when they make a full and unconditional surrender of the property to the payment of debts. The debtor can neither make terms, nor reserve anything to himself, until after all the creditors have been satisfied." The same determination to confine these assignments within the narrowest limits, and to scan every provision they contain without favor, has been still more strongly exhibited in the later case of Nicholson v. Leavitt,[3] in the same court (1852), on appeal from the Superior Court of the city of New York.

So in the case of Dunham v. Waterman,[4] Mr Justice Selden said: "The true principle applicable to all such cases is that a debtor who makes a voluntary assignment for the benefit of his creditors, may direct, in general terms, a sale of the property and collection of the dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied, but beyond this can prescribe no conditions whatever as to the management or disposition of the assigned property." And in a still later case it was remarked by Mr. Justice Davis, that "it is needless to cite authorities to show that by the law of this State preferential assignments are not for that reason fraudulent and void."[5]

In North Carolina, it was decided by the Supreme Court,

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[1] And see, to the same effect, the observation of Sandford, V. C., in Cram v. Mitchell, 1 Sandf. Ch. 251, 253; of Duer, J., in Nicholson v. Leavitt, 4 Sandf. S. C. 252, 280, 281; and of Allen, J., in Brigham v. Tillinghast, 15 Barb. 618.

[2] 2 N. Y. 365, 371.

[3] 6 N. Y. 510.

[4] 17 N. Y. 9.

[5] Jacobs v. Remsen, 36 N. Y. 668; Hauselt v. Vilmar, 76 N. Y. 630; affirming 43 Super. Ct. 574; see Dana v. Lull, 54 Id. 646. In Haydock v. Coope (53 Id. 68), it is held that the right to prefer cannot be exercised so as to secure directly or indirectly to the debtor the future control of any part of the assigned estate.

in the case of Hafner v. Irwin,[1] that though a debtor has a right, by the laws of the State, by a deed of trust, to convey all his property for the purpose of paying certain creditors in preference, yet there must be no condition, direct or indirect, controlling this application. Such a deed must be *bona fide* for the purpose it professes to have in view. In South Carolina, it was held in Smith v. Henry,[2] that the law allows a debtor to give a preference to one creditor over another, but it will not allow him to secure an advantage to himself, at the expense of creditors, as the price of such preference. In Tennessee, it was held in Galt v. Dibrell,[3] that though a debtor may, by a deed of trust, prefer one creditor to another, yet he cannot thereby contract for his own benefit, and secure to himself the use and enjoyment of the property; if he does so, the transaction is fraudulent and void as to other creditors. Similar views have been expressed by the Supreme Court of Alabama.[4] In Maryland, it was held, in American Exchange Bank v. Inloes,[5] that although, at common law, a debtor may secure one creditor to the exclusion of others, yet such a provision in a deed of trust is only permitted by a court of equity, and if followed by other provisions equally suspicious, the court will have little difficulty in discovering sufficient fraud to vacate the deed.[6]

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[1] 1 Ired. L. 490. The observations of Gaston, J., in this case, are very much in the strain of those of Sutherland, J., in Grover v. Wakeman, the principle of which is adopted. The following quotation may be added to what is said in the text: "It is enough, perhaps more than enough, for human infirmity, that the debtor shall be allowed, under these distressing circumstances, to select, according to his unbribed judgment, among his creditors, for those who merit a preference, and to make a simple and unconditional appropriation of his property to the payment of their claims. But to allow him to negotiate for terms with them —to seek out those who will be most favorable to him, either in the way of profit or commerce, direct or indirect—to stipulate, openly or covertly, with regard to the property conveyed, other than its appropriation to the purposes of the conveyance—would be injurious to the best interests of the community." Id. 499, 500.

[2] 1 Hill (S. Ca.), 16.

[3] 10 Yerg. 146; and see Lockhard v. Brodie, 1 Tenn. Ch. (Cooper), 384.

[4] Rankin v. Lodor, 21 Ala. 380.

[5] 7 Md. 380.

[6] The learned editor of the first volume of the "American Leading Cases," in concluding his notes to the cases of Thomas v. Jenks and Grover v. Wakeman, remarks that "the view now generally adopted appears to be this: that since the claims of creditors may be meritorious in unequal degrees, and since particu-

§ 167. *Preferences in Special Instances.*—It is to be observed, however, that even in some of those States where preferences in assignments have been either actually prohibited by being declared void by statute, or virtually prohibited by being rendered inoperative, the prohibition has been confined by the courts to cases of *general* assignments, where the preferences are given by the *assignment itself*, or by some instrument or act so connected with it as to be deemed in law part of the same transaction, and has been held not to extend to distinct *special* transfers of property, in payment or security of some particular debt. Thus, in New Hampshire, it has been held[1] that the statute of July 5, 1834, entitled "An act for the equal distribution of property assigned for the benefit of creditors," does not apply to an assignment made by a debtor of some particular part of his property, merely for the purpose of paying some particular debt or debts, nor to a pledge of all his attachable property, to secure a particular debt or debts,[2] nor to a mortgage of all his property to secure a portion of his debts.[3] So formerly in Massachusetts, the statute of 1836, c. 238, was held not to impair the debtor's right of securing a particular creditor, to the prejudice of other creditors, unless when attempted to be exercised by or in connection with a conveyance by the debtor to assignees, in trust for the use of any of his creditors.[4] Preferences given in this way, by mortgage,[5] and by the delivery to the creditor of promissory notes, immediately before executing an assignment under this statute,[6] were held not to avoid it.[7]

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lar creditors have it in their power to obtain a priority by legal proceedings, the preference of creditors is an allowed object or *result* of a debtor's assignment, but that it is not permitted to be used as a *means* of accomplishing ends which are not the legitimate objects of a debtor's efforts." 1 Am. Lead. Cases, 102 [75, ed. 1857].

[1] Meredith Manufacturing Co. v. Smith, 8 N. H. 347.

[2] Low v. Wyman, 8 N. H. 536; Danforth v. Denny, 35 N. H. 155.

[3] Barker v. Hall, 13 N. H. 298.

[4] Henshaw v. Sumner, 23 Pick. 446; see Fairbanks v. Haynes, Id. 323.

[5] Id. ibid. [6] Brown v. Foster, 2 Met. 152.

[7] But in that State, the right to prefer, by the direct transfer of property, has

§ 168. So, in Connecticut, where a debtor in failing circumstances, and with a view to his insolvency, executed a mortgage of his estate to certain of his creditors, and afterwards, on the same day, made a general assignment of his property, including the mortgaged premises, in trust for all his creditors, under the statute of 1828, c. 3, it was held that the mortgage and assignment were not to be deemed parts of the same transaction, and that the preference given by the former was not within the prohibition of the statute; the court holding that the object of the statute was merely to provide a responsible trustee to receive property when assigned for the benefit of creditors, and to cause it to be distributed proportionally among them; "but not at all to interfere with the long established principle of a debtor giving a preference voluntarily."[1] So, in New Jersey, it has been held,[2] that the act "to secure creditors on equal and just

been greatly abridged by statutory enactments (being parts of a system of insolvency). The provisions of the act are as follows: (Pub. Stat. (1882), pp. 894, 895.)

§ 89. If a person being insolvent, or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent, or in contemplation of insolvency, and that such payment, pledge, assignment or conveyance is made in fraud of the laws relating to insolvency, the same shall be void, and the assignees may recover the property or the value of it from the person so receiving it or so to be benefited.

§ 91. If a person being insolvent, or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer, or other conveyance of any description, of any part of his property to a person who then has reasonable cause to believe him to be insolvent, or in contemplation of insolvency, and that such sale, assignment, transfer, or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of said provisions, the sale, assignment, transfer or conveyance shall be void, and the assignee may recover the property or the value thereof as assets of the insolvency; and if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief.

[1] Bates v. Coe, 10 Conn. 280; Daggett, C. J., Id. 295. But see the act of 1858, Gen. St. (Rev. of 1875), p. 378.

[2] Tillou v. Britton, 4 Halst. 120; Garr v. Hill, 1 Stock. 210, 215; Moses v. Thomas, 26 N. J. L. 124; Van Waggoner v. Moses, Id. 570; Garretson v. Brown, 26 Id. 425.

division of the estate of debtors who convey to assignees for the benefit of creditors," does not extend to a solitary transfer of an individual item of property to a creditor, in payment of a debt; and the operation of the act must be confined, if not to cases where a trust is created, at least to cases where there is something like universality in the assignment. Mortgages and judgments, also, are expressly excepted, but judgments confessed for the purpose of preferring creditors, are within the act.[1] In Pennsylvania, preferences by direct transfers of property to the creditors preferred, are not within the act of April 17, 1843, concerning preferences in assignments.[2] Nor are judgments confessed to secure creditors such preferences as are avoided by that act, although an assignment for creditors may be intended, and be shortly afterwards executed.[3] In Ohio, an absolute conveyance to a creditor, in payment of his debt, does not come within the provisions of the act of February 23, 1835, relating to fraudulent assignments,[4] nor was it affected by the later statutes of 1838, 1853 and 1859.[5] And the rule is the same in the case of a mortgage to a creditor, unless where it is for the benefit of some other creditor besides the mortgagee.[6] And in Georgia, an absolute conveyance of property by a debtor, who is in fact insolvent, to a creditor, in payment of his debt, without any reservation for the benefit of the debtor, is not fraudulent as to the other creditors, under the statute of 1818, "to prevent assign-

[1] See Rev. of N. J. (1878), p. 86.

[2] Worman v. Wolfersberger's Ex'rs, 19 Penn. St. 59; Uhler v. Maulfair, 23 Id. 481; Hopkins v. Beebe, 26 Id. 85; Hutchinson v. McClure, 20 Id. 63; Morgan's Appeal, Id. 152; Griffin v. Rogers, 38 Id. 382; Mellon's Appeal, 1 Grant, 212; York Co. Bank v. Carter, 38 Penn. St. 446. But it applies to partial assignments for the benefit of particular creditors. Miners' Bank Appeal, 57 Penn. St. 198.

[3] See *ante*, p. 215, note 4.

[4] Wilcox v. Kellogg, 11 Ohio, 394; Wood, J., Id. 399.

[5] Hulls v. Jeffrey, 8 Ohio, 390; Lane, J., Id. 391; see Doremus v. O'Hara, 1 Ohio St. 45.

[6] Bloom v. Nagle, 4 Ohio St. 45; Harkrader v. Leiby, Id. 602; Atkinson v. Tomlinson, 1 Id. 237; Justice v. Uhl, 10 Id. 170; Dickson v. Rawson, 5 Id. 218; see Mitchell v. Gazzam, 12 Ohio, 315; overruled in Atkinson v. Tomlinson, *supra*.

ments," &c.[1] Nor is a mortgage given to secure a just debt, within such statute.[2] But, in Louisiana, if a debtor shall, within three months next preceding his failure, have sold, engaged, or mortgaged any of his goods and effects, or shall have otherwise disposed of the same, in order to give an unjust preference to one or more of his creditors over the others, such deed or act is required to be declared null and void.[3]

So, in Iowa, it has been repeatedly held that the statute prohibiting preferences does not limit or affect the right of an insolvent debtor to sell or mortgage, *bona fide*, a part or all of his property to one or more of his creditors in payment or security of a particular debt.[4]

§ 169. *Preferences in Partial Assignments.*—It has been thought that an assignment giving preferences to certain creditors or classes of creditors is not valid unless it contains a transfer of *all* the debtor's property; and expressions may be found in the opinions of the court in several important cases, which go the length of establishing such a doctrine. Thus, in Goodrich v. Downs,[5] in the Supreme Court of this State, Bronson, J., in delivering the opinion of the court, observes: "Such transfers have only been allowed to stand where the debtor makes an unconditional surrender of his effects, for the benefit of those to whom they rightfully belong."[6] "They can only be supported," says the same learned judge, in Barney v. Griffin, in the Court of Appeals,[7] "when they make a full and unconditional surrender of the

[1] Eastman v. McAlpin, 1 Kelly (Ga.), 157; Cameron v. Scudder, Id. 204; McWhorter v. Wright, 5 Ga. 555; Starnes, J., in Miller v. Conklin, 17 Ga. 430, 433; Brown v. Lee, 7 Ga. 267; Ezekiel v. Dixon, 3 Kelly (Ga.) 146; see Code of Ga. (ed. 1873), § 1953, and see the proviso in the statute.

[2] Davis v. Anderson, 1 Kelly, 176; Lee v. Brown, 7 Ga. 276; Lavender v. Thomas, 18 Ga. 668, 675.

[3] Rev. Stat. of La. (ed. 1870), p. 359, §§ 28, 1801.

[4] Lambson v. Arnold, 19 Iowa, 479; Cole v. Dealman, 13 Id. 551; Gray v. McCallister, 50 Id. 497; Johnson v. McGrew, 11 Id. 151; Fromme v. Jones, 18 Id. 457; Whitaker v. Lindley, 14 Id. 598; Buell v. Buckingham, 16 Id. 284; Davis v. Gibbon, 24 Id. 257; Farrall v. Howard, 26 Id. 381; Graves v. Alden, 13 Id. 573.

[5] 6 Hill, 488. [6] Id. 489. [7] 2 N. Y. 365, 371.

property, to the payment of debts." In Burdick v. Post,[1] Barculo, J., more explicitly says: "As we understand the settled law in this State, derived from an examination of all the decisions, assignments preferring certain creditors are only tolerated when they are absolute and unconditional; when they devote *the whole of the assignor's property* to the immediate and unqualified payment of his debts," &c.[2] In Rathbun v. Platner,[3] Mason, J., observes: "The law only tolerates them when honestly made for the purpose of giving the preference, and devoting *the whole property of the debtor* to the payment of the debts." Similar expressions may be found in decisions made in the courts of other States.[4] But in the leading case of Grover v. Wakeman,[5] upon which the New York decisions above referred to either professedly or actually, for the most part, rest, the opinion of the court, instead of declaring partial assignments with preferences void, expressly admits their validity. "It is now too late," observes Mr. Justice Sutherland, in this case, "to agitate the question whether these assignments, *either partial or general*, are sustained by considerations of true wisdom and policy. * * * They have become thoroughly incorporated into our system; and all that it is now competent for our courts to do, is to see that they fairly appropriate all the insolvent's property, *or such portion of it as he undertakes to assign*, to the payment of his just debts."[6] The true doctrine is here stated with great clearness and discrimination. It has been further laid down, in a work of authority,[7] as the general American rule on this

[1] 12 Barb. 168.

[2] Id. 175.

[3] 18 Barb. 272, 275. See also, the observations of Comstock, J., in Curtis v. Leavitt, 15 N. Y. 182.

[4] Sangston v. Gaither, 8 Md. 40; Phelan, J., in Rankin v. Lodor, 21 Ala. 380, 389; Goldthwaite, J., in Shackelford v. P. & M. Bank of Mobile, 22 Id. 238, 245.

[5] 11 Wend. 187.

[6] Id. 195.

[7] American Leading Cases (Hare & Wall. notes), 65 (ed. 1857). In Vermont, prior to the statute prohibiting preferences, partial assignments with preferences were held to be valid. Hall v. Dennison, 17 Vt. 310; and see Cole v. Dealman, 13 Iowa, 551, and cases cited *ante*, p. 218. In Gray v. McCallister, 50 Iowa, 497, a transaction was held "to be nothing more than a partial assignment of the debtor's property in good faith, preferring certain of his creditors. Such an as-

point, that in the absence of statutory prohibitions and of a bankrupt law, partial as well as general assignments may be made with preferences to creditors. In the case of Wilson v. Forsyth,[1] in the Supreme Court of this State, the question as to the validity of a partial assignment with preferences was distinctly raised and argued; and the court (Gould, J.), after reviewing the cases, came to the conclusion that an assignment giving preferences among creditors, and not embracing *all* the debtor's property, is not void for those reasons. In Maryland,[2] it is held that an assignment creating preferences and exacting releases is void, unless it appears on its face, to convey all the property of the debtor, and where it is executed by partners it must so appear to convey both their partnership effects and their individual estate.

§ 170. II. *Restrictions on the Right to Prefer.*—The right to prefer one or more creditors to others, in assignments by debtors, is sometimes either restrained or entirely taken away by statute, as has been shown under the last head. Where a bankrupt law exists, the right is also considered as taken away, its exercise having always been regarded as inconsistent with the policy and objects of such a system.[3] And the insolvent laws of a State sometimes create a restriction in this respect by depriving an insolvent debtor, who attempts to exercise the right, of the benefit of a discharge under them. This is the case in New York, where it is provided that if an insolvent debtor, at any time within two years before presenting his petition for a discharge, in contemplation of his becoming insolvent, or of his petitioning for a discharge under the statute, or knowing of

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signment is not invalid." Partial assignments with preferences which do not except releases are valid in Maryland. Price v. Ford, 18 Md. 489. But in the Michigan case of Smith v. Mitchell (12 Mich. 180), it was said that the assignment was void if it did not fairly, *bona fide*, assign all of the assignor's property liable for the payment of his debts. See Carpenter v. Underwood, 9 N. Y. 520; McClelland v. Remsen, 36 Barb. 622; affi'd 33 How. 618.

[1] 22 Barb. 105, 122–127.

[2] Maughlin v. Tyler, 47 Md. 545; Loney v. Bayly, 45 Id. 447.

[3] 2 Kent's Com. [532] 688; see Ex parte Breneman, Crabbe, 456; Caryl v. Russell, 13 N. Y. 194.

his insolvency, have made any assignment, sale or transfer, either absolute or conditional, of any part of his estate, real or personal, or of any interest therein, or has confessed any judgment or given any security with a view to give a preference for an antecedent debt to any creditor, he shall not be entitled to a discharge under the statute.[1] Similar provisions have been enacted in Massachusetts[2] and Delaware.[3] By the insolvent laws of Maryland, any confession of judgment, or any conveyance or assignment made by any insolvent for the purpose of defrauding his creditors, or giving an undue preference, is declared void, and the property so assigned vests in the insolvent trustee.[4] But these provisions do not avoid *bona fide* assignments by debtors merely because of preferences given to some creditors over others.[5] So in South Carolina, assignments by debtors giving undue preferences to creditors have the effect of debarring such debtors from the benefit of the insolvent or "prison bounds" act.[6] But in North Carolina, a deed of trust to satisfy certain creditors, conveying an amount of property greater in value than the amount of debts secured by the deed, is no bar to the debtor's taking the insolvent act, if he sets forth the deed in his schedule, and surrenders all his resulting interest.[7]

In New York, the power to make an assignment, with or without preferences, is entirely denied to a debtor against whom proceedings have been instituted by a creditor under the "act to abolish imprisonment for debt, and to punish fraudulent debtors."[8]

§ 171. *Limited Partnerships.*—The right of giving preferences to creditors is also, in many of the States, denied to

[1] Code of Civ. Procedure, § 2173; see Egberts v. Wood, 3 Paige, 517, 521.
[2] Rev. Stat. (ed. 1860), p. 586; Pub. Stat. (1882), p. 893, § 93.
[3] Rev. Code of Del. (ed. 1874), p. 785.
[4] Md. Code (1878), p. 719, art. 67, §§ 7, 8.
[5] McColgan v. Hopkins, 17 Md. 395.
[6] McKenzie v. Garrison, 10 Rich. L. 234; and see Brandon v. Rogers, Id. 9.
[7] Adams v. Alexander, 1 Ired. L. 501.
[8] Spear v. Wardell, 1 N. Y. 144; Wood v. Bolard, 8 Paige, 556, 557.

limited partnerships, even where preferences by other partnerships are allowed. Thus, in New York, every sale, assignment or transfer of any of the property or effects of a limited partnership, made by such partnership when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with the intent of giving a preference to any creditor of such partnership or insolvent partner over other creditors of such partnership, and every judgment confessed, lien created, or security given by such partnership, under the like circumstances and with the like intent, are, by statute, declared void as against the creditors of such partnership.[1] Similar preferences given by any general or special partner are also declared void.[2] Similar provisions[3] have been enacted in Rhode Island,[4] New Jersey,[5] Pennsylvania,[6] Ohio,[7] Indiana,[8] Virginia,[9] South Carolina,[10] Alabama,[11] Florida,[12] Arkansas,[13] California,[14] Illinois,[15] Michigan,[16] Wisconsin,[17] Missouri,[18] and other States.[19]

§ 172. *Restrictions on the Right of Corporations to Prefer.*—The right of a corporation to prefer its creditors in or by an assignment of its property has in some of the States

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[1] 3 Rev. Stat. (7th ed.) p. 2233.

[2] Id. ibid. See Mills v. Argall, 6 Paige, 576; Whitcomb v. Fowle, 7 Abb. N. C. 275; see *ante*, p. 128.

[3] In Massachusetts, the provisions of the insolvent act are extended to limited partnerships. Rev. Stat. (ed. 1860), p. 597, § 110; Pub. Stat. (ed. 1882), p. 900.

[4] Gen. Stat. (1872), p. 260, § 10.

[5] Nix. Dig. 4th ed.) p. 688; Rev. of N. J. (1878), p. 808.

[6] Purd. Dig. (ed. 1872), pp. 937, 938, §§ 22, 23.

[7] Laws of 1846, p. 26; Rev. Stat. (S. & C.) p. 905, §§ 17, 18; R. S. (1880), § 3156.

[8] Rev. Stat. (G. & H.) p. 462; Stats. of Ind. (1876), p. 640.

[9] Code of Virginia (ed. 1873), p. 991, § 10.

[10] 6 Stat. 578; Acts of 1846, p. 365; Rev. Stat. (1873), p. 362.

[11] Rev. Code of Alabama (1867), § 1819; Code of Ala. (1876), § 2083.

[12] Thomp. Dig. (ed. 1847), p. 233, § 10; McClellan's Dig. (1881), p. 800.

[13] Rev. Stat. (ed. 1874), §§ 4368, 4369.

[14] Civil Code of Cal. (Hitt.) 7496.

[15] Rev. Stat. (ed. 1874), p. 680, § 22; R. S. (ed. 1881, Cothran), p. 949.

[16] Comp. L. (ed. 1871), p. 523.

[17] Stat. of Wis. (Taylor, 1871), p. 849; R. S. of Wis. (ed. 1878), § 1719, p. 502.

[18] 2 Stats. of Missouri (Wagner, 1872), p. 978, § 10; 1 R. S. (1879), p. 581.

[19] See Troub. Law of Limited Partnership, c. 13, p. 388.

been subjected to material restrictions by statute.[1] Thus, in New York, where an individual debtor's right to give preference is unquestioned, it has been provided by statute on the subject of moneyed corporations—after declaring that no conveyance, assignment or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation, of any of its real estate, or of any of its effects exceeding the value of one thousand dollars[2]—"that no such conveyance, assignment or transfer, nor any payment made, judgment suffered, lien created, or security given by any such corporation when insolvent or in contemplation of insolvency, with the intent of giving a preference to any particular creditor over other creditors of the company, shall be valid in law; and every person receiving, by means of any such conveyance, assignment, transfer, lien, security or payment, any of the effects of the corporation, shall be bound to account therefor to its creditors or stockholders, or their trustees, as the case shall require."[3]

§ 173. The language of the ninth section of the statute, just cited, has been made the subject of much discussion in several cases in the courts of this State.[4] In the case of Gillet v. Phillips,[5] in the Court of Appeals, it was said that "when a moneyed corporation was insolvent, in such a sense that all its debts cannot probably be discharged from its assets, the payment of any one creditor in full is a preference within the meaning of the statute."[6] But it was in the later case of Curtis v. Leavitt,[7] in the same court, that the language of the same section received the fullest consideration, and the meaning of the terms "insolvency," "contemplation of insolvency," and "intent of giving a pref-

[1] See *ante*, p. 98 *et seq.*

[2] 2 Rev. Stat. (7th ed.) p. 1366, § 8.

[3] 2 Rev. Stat. (7th ed.) p. 1366, § 9.

[4] See Bowery Bank Case, 5 Abb. 415; s. c. 16 How. Pr. 56; Matter of Empire City Bank, 10 How. Pr. 498; Brouwer v. Harbeck, 9 N. Y. 589; Curtis v. Leavitt, 15 N. Y. 9; Gillet v. Phillips, 13 N. Y. 114; Johnson v. Bush, 3 Barb. Ch. 207.

[5] 13 N. Y. 114.

[6] Gardiner, C. J., Id. 119, cited by Brown and Paige, JJ., in the case, *infra*.

[7] 15 N. Y. 9.

erence," was considered at much length in the course of the opinions delivered. "The term insolvency," it was said, "can mean nothing less than the inability of the company and the inadequacy of its property to pay its debts, and not a present inability to pay in cash or its equivalent."[1] "The insolvency intended by the statute was an actual or absolute insolvency, by which is meant an inability of the company to pay all its debts from its own property."[2] "A contemplation of insolvency is where the debtor, having full knowledge of his embarrassed circumstances, has no hope or expectation of relief, and anticipates an entire failure in business and absolute insolvency; or when his circumstances are such that any prudent man, taking a reasonable view of his situation and of the surrounding circumstances, might at the time fairly expect insolvency to follow."[3] The result arrived at by the court was, that "notwithstanding the fact of insolvency, according to any definition of the term, a conveyance by a moneyed corporation is not within the said ninth section, unless made with *intent* to prefer a particular creditor over others. The intent to prefer is a fundamental fact, which must be alleged and proved."[4] "From this it must follow," said Comstock, J., "that so long as the debtor corporation, notwithstanding the pressure of great embarrassments, entertains an honest expectation, in the exercise of a reasonable intelligence, of going on with its business and paying all its debts, its acts cannot be brought within the operation of this statute. While this expectation is entertained in sincerity and good faith, it may lawfully secure a particular creditor, or sell or pledge a portion of its assets to raise money to meet its necessities."[5] "The intent to give a preference," said Paige, J., "and either an actual insolvency

[1] Brown, J., Id. 150. The learned judge cites 2 Bell's Com. 162, and Gillet v. Phillips, cited *supra*.

[2] Paige, J., Id. 200. The learned judge goes into a critical examination of the meaning of the term, and gives various definitions.

[3] Paige, J., Id. 203, citing Gibson v. Muskett, 3 M. & G. 158, 168.

[4] 15 N. Y. 10.

[5] 15 N. Y. 109. See the observations, Brown, J., Id. 139.

or a contemplation of insolvency, must be proved as facts. The intent and the contemplation of insolvency may be proved either by direct evidence, or inferred as the necessary consequence of other facts clearly proved. If insolvency is relied upon to defeat the securities, knowledge of the insolvency by the directors of the company, or a belief by them that it existed at the time the securities were made, must be proved, for an intent to give a preference to particular creditors, in fraud of all other creditors of the company, cannot be conceived, except as connected with a knowledge or belief that the company is insolvent, or with a contemplation of its insolvency."[1]

It has been decided by the Supreme Court of this State that insurance companies are within the provision of the statute prohibiting preferences.[2]

§ 174. In New Jersey, it is provided by statute, that whenever any incorporated company shall become insolvent, or shall suspend its ordinary business for want of funds to carry it on, it shall not be lawful for the directors or managers of the company, or for any officer or agent, to sell, convey, assign or transfer any of the estate, effects, choses in action, goods, chattels, rights or credits, lands or tenements of the said company; nor shall it be lawful to make any such sale, conveyance, assignment or transfer, in contemplation of the insolvency of any such company; and every such sale, conveyance, assignment, or transfer shall be utterly null and void as against creditors; provided always, that in case of a *bona fide* purchase made for a valuable consideration, before such company shall have actually suspended its ordinary business, by any person having no knowledge, information, or notice of the insolvency of such company, or of the sale being made in contemplation of its insolvency, such purchase shall not be invalid or impeached.[3] In the case of

[1] 15 N. Y. 198.

[2] Hill v. Reed, 16 Barb. 280; Hurlbut v. Carter, 21 Id. 221.

[3] Nixon's Dig. (4th ed.) p. 405, § 2; see Rev. of N. J. (1878), p. 189.

Holcomb's Ex'rs v. The President and Managers of the New Hope Delaware Bridge Company,[1] it was said by Chancellor Williamson, that the object of this section was to prevent companies actually insolvent, or whose embarrassments were such as must inevitably lead to insolvency, from doing what it is lawful for an individual debtor to do—make a *preference* in favor of any one or more of its creditors.

In Ohio, it is provided by the banking act of March 21, 1851,[2] that "all transfers of notes, bonds, bills of exchange, and other evidences of debt, owing to any banking company, or of deposits to its credit; all assignments or mortgages, or other securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its stockholders or creditors; all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be held utterly null and void.

In Louisiana, every assignment, transfer, conveyance, or sale of property or assets, made by a banking company after the protest of any of its notes, is declared by statute null and void.[3]

In Connecticut, corporations are expressly included in the provisions of the act of 1853, "for the relief of insolvent debtors, and for the more equal distribution of their effects among their creditors."[4]

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[1] 1 Stock. 457, 459. But the effect of the provision has since been declared to be, to prohibit assignments by corporations, whether conferring preferences or not. Am. Ice Machine Co. v. Paterson St. Fire Eng. & Mach. Co. 22 N. J. Eq. 72.

[2] Rev. Stat. of Ohio (S. & C.), p. 172, § 28; R. S. of Ohio (1880), p. 1884; see Rossman v. McFarland, 9 Ohio St. 369.

[3] Rev. Stat. (ed. 1870), p. 68, § 295.

[4] Gen. Stat. (Rev. of 1875), p. 378.

§ 175. III. *Subjects of Preferences in Assignments.*— In those States where preferences are not prohibited by statute, it is well settled that not only actual *creditors*, but *sureties* and *indorsers* may be preferred by debtors, in making assignments of their property.[1] Drawers and indorsers of what is termed "accommodation paper," being considered entitled to peculiar favor, are frequently provided for in this way. A debtor is also allowed to secure a creditor for future advances and responsibilities, as well as for existing claims and engagements, by an assignment of property to him, in preference to other creditors.[2] Sureties liable on existing, or even future responsibilities, are as much entitled to indemnity and preference as creditors in the more strict sense of that term.[3] And a deed of assignment for the security of indorsers is valid, although no payments have been made by them at the time of its execution.[4] It seems that a wife's claim for dower may be preferred.[5]

§ 176. A preference also may not only be *personal*, but may be extended so as to cover particular demands, *whoever* may be the holder. Thus, where, among the preferred demands contained in a schedule, annexed to an indenture of assignment, was "S. & T.'s draft (accepted by the debtors), for which they hold a mortgage of B. W." &c., it was held that the trust was not personal to S. & T., but that the holders of the draft, to whom it had been indorsed before the making of the indenture, were entitled to the benefit of the trust.[6]

A debtor making an assignment may also include among

[1] Hendricks v. Robinson, 2 Johns. Ch. 283; affirmed on error, 17 Johns. 438; Cunningham v. Freeborn, 11 Wend. 240; Lansing v. Woodworth, 1 Sandf. Ch. 43; Duval v. Raisin, 7 Mo. 449.

[2] Hendricks v. Robinson, 2 Johns. Ch. 283; see Barnum v. Hempstead, 7 Paige, 568; *ante*, pp. 155, 156.

[3] Cunningham v.Freeborn, 11 Wend. 240. [4] Duvall v. Raisin, 7 Mo. 449.

[5] Miller v. Crawford, 32 Gratt. 277; Reiff v. Horst, 55 Ind. 42; see Reiff v. Eshleman, 52 Id. 582.

[6] Ward v. Lewis, 4 Pick. 518. The court in this case say, "The parties were designating the *demands* which were to be paid in full, and not the persons to whom payment was to be made;" and cite Heilner v. Imbrie, 6 Serg. & R. 401.

preferred debts, such as have been previously secured by either judgment or mortgage; and a provision for their payment will not render the assignment fraudulent and void.[1] But the creditors thus doubly secured, are held bound in equity to resort to their previous security first, so as to give the other creditors provided for, the benefit of the assigned fund.[2]

§ 177. IV. *Modes of giving Preferences in Assignments.*—Preferences may be given to creditors in a variety of forms: as, by simply directing certain named creditors, or designated debts, to be first paid in full out of the proceeds of the assigned property, and the balance to be applied for the benefit of all the other creditors without distinction; or by formally dividing the creditors into numbered or designated *classes*, arranged in a certain *order*, and directing each class to be paid, to the extent of the proceeds applicable for that purpose, before the one immediately following.

§ 178. Again, preferences may be given either *absolutely*, as by directing certain named creditors to be first paid, at all events; or *upon condition*, as by preferring such creditors as shall comply with certain requisitions named in the assignment. In regard to the latter species of preferences, it has been said that a debtor having an unquestionable power of preference, of which he is the absolute master, may set his price upon it, provided it be not a reservation of part of the effects for himself, or anything that would carry his power beyond mere preference;[3] and that a debtor may deprive the creditor who refuses to accede to his terms, of his preference, and postpone him to all other creditors.[4] A

[1] Strong v. Skinner, 4 Barb. 546; Kruse v. Prindle, 8 Oregon, 158.

[2] Besley v. Lawrence, 11 Paige, 581.

[3] Gibson, C. J., in Thomas v. Jenks, 5 Rawle, 221; and see Layson v. Rowan, 7 Rob. (La.) 1; but see Jackson v. Cornell, 1 Sandf. Ch. 348, 354.

[4] Kent's Com. [534] 694; see Bellows v. Patridge, 19 Barb. 176. In this case, the assignment preferred, in the third class of creditors, two notes made to one H. upon condition that H. accounted for certain collaterals. If he did not account for them, however, no portion of the assigned property was to be applied on those notes until all the residuary creditors were paid except B. The notes

condition of preference frequently inserted in assignments, is that which requires the creditors to exhibit their demands to the assignee within a specified period; and a condition of this kind has been sustained in New York.[1] Another condition of constant occurrence has been that which requires the creditors to *release*, or agree to release, their claims against the debtor, by becoming parties to the assignment itself, where it contains a release, or by the execution of a separate instrument to that effect. Assignments containing both these species of condition, have been adjudged to be valid in Rhode Island.[2] But the coercive power which such a condition obviously gives to the debtor has subjected it to much question, and where it is not regarded as illegal, it is now usually viewed with disfavor.[3] A provision in an assignment postponing the payment of those creditors who should have made any cost or expense upon their claims until all the other creditors should be paid in full, has been held to be fraudulent and void.[4] And as to conditions of preference generally, the inclination of the courts in most of the States is against them, as has already been shown in this chapter.

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were then to be paid, and B.'s claim was to follow. In any event, B. was to be paid last. It was held by the court that these provisions were nothing more than the exercise of the assignor's undoubted right to direct preferences, and to prescribe the order in which his debts should be paid, and did not render the assignment void. In the case of Spaulding v. Strong (37 N. Y. 135; s. c. 38 N. Y. 9), preferences were given to such of the creditors as had already executed a conditional release on receiving 50 per cent. of their claims. If the preference had been conditioned on the release, the assignment would have been invalid under the decisions in Grover v. Wakeman (11 Wend. 201); Hyslop v. Clarke (14 Johns. 458). See also, to the same effect, Low v. Graydon, 50 Barb. 414; Powers v. Graydon, 10 Bosw. (N. Y.) 630; see Palmer v. Giles, 5 Jones' Eq. (N. Ca.) 75. In the case of Grant v. Chapman (38 N. Y. 293), a provision preferring the amount found due in certain attachment proceedings, provided they were sustained and were a lien, was not regarded as rendering the assignment invalid, as being conditional or giving an illegal preference. See Haydock v. Coope, 53 N.Y. 68, 74.

[1] Ward v. Tingley, 4 Sandf. Ch. 476.

[2] Pearce v. Jackson, 2 R. I. 35; see Nightingale v. Harris, 6 R. I. 321; Sadlier v. Fallon, 4 Id. 490; Allen v. Gardner, 7 Id. 22.

[3] In Pennsylvania, by the act of April 16, 1849, a condition in an assignment for the payment of those creditors only who shall execute a release, is declared to be a preference in favor of creditors, and to be void. Laws of 1849, p. 664; Purdon's Dig. p. 22, pl. 8. The subject of stipulations for a lease, as a general condition in assignments, will be more fully considered in Chapter XI.

[4] Marsh v. Bennett, 5 McLean, 117, 123.

§ 179. It is a further rule on the subject of preferences, that the debtor must declare such preferences *in the assignment* at the *time of executing it*, and he cannot reserve to himself or transfer to his assignee the right to declare future preferences, or to change the order of the preferences already given, or to give preferences at the assignee's discretion.[1] Assignments containing provisions to this effect have been repeatedly held fraudulent and void.[2] Thus, where an assignment contained a provision giving to the assignee a discretionary power to pay off or discharge a certain class of claims against the assignor, or certain small debts due from the latter, in preference to other debts provided for in the assignment, it was held void as against the creditors of the assignor, as being calculated to injure, delay and hinder creditors in the collection of their just debts.[3] So, where a debtor in failing circumstances made an assignment of all his property to trustees in trust, to apply the proceeds to the payment of certain preferred creditors, so far as should be necessary, and to apply the residue of the proceeds to the payment of his other creditors, in such order of priority as the trustees should think proper, and if the fund was insufficient to pay all such debts, then to apply the same in payment of such part of such debts as the trustees should judge most just and equitable; it was held that the assignor could not legally delegate to the trustees the power to give preferences at their discretion, and that the assignment was fraudulent and void as to creditors who did not assent to the same.[4] So where an assignment providing for the payment of the debts of the assignor, according to several

[1] Sutherland, J., in Grover v. Wakeman, 11 Wend. 187; Boardman v. Halliday, 10 Paige, 223, 228; Sandford, A. V. C., in Van Nest v. Roe, 1 Sandf. Ch. 4; 2 Kent's Com. [532] 691, note; Van Vorst, J., in Kercheis v. Schloss, 49 How. 288.

[2] Barnum v. Hempstead, 7 Paige, 568; Boardman v. Halliday, 10 Id. 223; Sheldon v. Dodge, 4 Den. 217; Strong v. Skinner, 4 Barb. S. C. 546; Averill v. Loucks, 6 Id. 470; Mitchell v. Stiles, 13 Penn. St. 306; Gazzam v. Poyntz, 4 Ala. 374.

[3] Barnum v. Hempstead, 7 Paige, 568, 571; see Morse v. Slason, 13 Vt. 296.

[4] Boardman v. Halliday, 10 Paige, 223.

classes of preference, contained a provision that if any of the debts in the sixth class should become pressing, and the trustees should thereupon assume them, the debts so assumed should be preferred over similar debts in the prior classes—the assignment was held void as to non-assenting creditors.[1] And it is immaterial whether the right thus to declare or alter preferences is reserved by the express terms of the assignment, or only in effect and in substance; as through the medium of a power to the assignees to compound with certain creditors,[2] or a right to annex schedules at a future period. Accordingly, where an assignment directed the assignees to pay the debts specified in the schedules annexed thereto, according to the priority of the several schedules, and provided that such schedules should be made within sixty days, and be annexed to and form a part of the assignment, but did not prescribe what debts should be inserted in the respective schedules, or in what order they should be arranged therein, the preparation of such schedules being left entirely to the discretion of the assignors; and it appeared that such schedules had not been made out and annexed to the assignment previous to its execution, but that they were prepared by the assignors and annexed at some subsequent time—it was held that the assignment was fraudulent and void.[3] But where an assignment providing for the payment of creditors in certain classes, directed the assignee to pay, as a third class, such creditors as should present their claims within a certain time after notice to be given by him, it was held that this was not giving to the assignee a discretion as to performances, within the meaning of the rule established by the preceding cases.[4]

§ 180. A deed of trust for the benefit of creditors may have the effect of preferring certain debts by *implication*

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[1] Sheldon v. Dodge, 4 Den. 217.
[2] Wakeman v. Grover, 4 Paige, 23, 41.
[3] Averill v. Loucks, 6 Barb. S. C. 470; Kercheis v. Schloss, 49 How. Pr. 284.
[4] Ward v. Tingley, 4 Sandf. Ch. 476, 479.

without any express words. Thus, where such a deed was made to secure certain creditors, for some of whose debts sureties were bound, and the deed directed the trustees so to dispose of the trust property that no surety in the said debts should suffer or be injured on account thereof, it was held that the debts for which sureties were bound were preferred debts, and to be first satisfied.[1]

§ 181. *Illegal and Fraudulent Preferences.*—Where a preference is privately given to one or more creditors over others, contrary to the principle and professed object of the deed of assignment itself, it is clearly fraudulent and void. This happens more frequently in cases of *deeds of composition* between a debtor and his creditors, in which the parties always profess to deal upon equal terms, and are supposed to stand in the same situation.[2] In regard to these instruments, the rule has been established in England by numerous cases, that any secret or separate agreement between the debtor and one or more of the creditors, by which a greater advantage is secured to them than the others would have under the deed,[3] whether in the form of payment or security of the balance of their debts,[4] or of a greater sum than the deed purports to secure to all,[5] or of additional security, though for no great sum,[6]—is a fraud upon the other creditors,[7] and is void not only in equity but at law.[8] And the

[1] Miller v. Holcombe's Ex'r, 9 Gratt. 665.

[2] Best, C. J., in Britton v. Hughes, 5 Bing. 465.

[3] Mawson v. Stock, 6 Ves. Jr. 300.

[4] Spurrett v. Spiller, 1 Atk. 105; Middleton v. Lord Onslow, 1 P. Wms. 768; Jackson v. Mitchell, 13 Ves. Jr. 561; Jackson v. Lomas, 4 Term R. 166.

[5] Chesterfield v. Janssen, 2 Ves. 125; Lord Hardwick, Id. 156.

[6] Ex parte Sadler & Jackson, 15 Ves. Jr. 52; Leicester v. Rose, 3 East, 371.

[7] It is said to be a fraud both upon the debtor and the other creditors. Ex parte Sadler & Jackson, *ubi supra;* and see Jackson v. Mitchell, 13 Ves. Jr. 581. In Hagen's Appeal (11 Weekly Notes of Cas. 86), it is held that where a creditor who has become a party to a composition deed, whereby he agrees in common with the other creditors to take the notes of the common debtor, payable at a future day, for the amount of his claim, subsequently gives up said notes to the debtor, and receives from him other and better security in lieu thereof, such action will not be deemed fraudulent as against the other creditors, unless in pursuance of an agreement entered into with the debtor prior to or contemporaneous with the execution of the composition deed.

[8] Jackman v. Mitchell, *ubi supra;* Cockshott v. Bennett, 2 Term R. 763.

rule is the same whether the agreement be voluntary on the part of the debtor, with the object of inducing the creditor preferred,[1] or other creditors, to agree to the composition;[2] or whether the preference be extorted by the creditor by holding out a threat of refusal to sign.[3] And in a case where a creditor refused to accede to the proposed composition until the debtor's brother agreed to supply him with coal equal in value to the residue of the debt, which agreement was unknown to the other creditors and was fully performed by the brother, it was held that the creditor could not recover upon the note given him for the amount of the composition.[4] The doctrine established by the preceding cases has also received the sanction of the courts in this country.[5]

The same rule against secret preferences has been applied in England[6] and the United States[7] to cases of deeds of trust for the benefit of creditors ratably, where the creditors become parties, or agree to release the debtor on receiving their proportion of the trust fund.[8]

Any unlawful consideration moving from the preferred creditor to induce the performance, may avoid the deed which gives it.[9]

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[1] Chesterfield v. Janssen, 2 Ves. 125.

[2] Buller, J., in Jackson v. Lomas, 4 Term R. 166; Bennett v. Ellison, 28 Minn. 242.

[3] Spurrett v. Spiller, 1 Atk. 105; Cockshott v. Bennett, 2 Term R. 763; O'Shea v. The Collier White Lead & Oil Co. 42 Mo. 397.

[4] Knight v. Hunt, 5 Bing. 432.

[5] Russell v. Rogers, 10 Wend. 473, 499; Breck v. Cole, 4 Sandf. S. C. 79. The latter case contains a good summary of the doctrines on this point.

[6] Cockshott v. Bennett, 2 Term R. 763; Jackson v. Lomas, 4 Id. 166.

[7] Smith v. Stone, 4 Gill & J. 310; Case v. Gerrish, 15 Pick. 49; Clarke v. White, 12 Pet. 178; O'Shea v. The Collier White Lead & Oil Co. 42 Mo. 397.

[8] The rule against secret preferences has also been applied to cases of the direct transfer of property to the creditor preferred. Edrington v. Rogers, 15 Tex. 188; Hancock v. Horan, Id. 507.

[9] Marshall, C. J., in Marbury v. Brooks, 7 Wheat. 556.

CHAPTER XI.

ASSIGNMENTS WITH SPECIAL PROVISIONS.

§ 182. Allusion has already been made to the simplest form of a deed of assignment for the benefit of creditors, as being that where the debtor's property is unconditionally and unreservedly transferred to the assignee, with a general authority to the latter, to receive, hold, and dispose of it, for the equal benefit of all the creditors. It has been a common practice, however, to introduce into these instruments *special clauses* of various kinds, tending to limit or modify their usual operation, such as conditions on which creditors are to have the benefit of them; reservations for the benefit of the assignor; provisions as to the time and mode of disposing of the property; and special directions to the assignee, as to the manner of executing the trust.

Some of these clauses are entirely within the admitted scope of the power which the law allows an assignor, of directing the disposition of the property assigned; and are useful in practice, as more clearly expressing the objects of the trust, and as defining, for the greater convenience of the assignee, the course of his proceedings, and the nature and extent of his duties and powers. Others are either of doubtful utility, or decidedly objectionable, as tending to give rise to questions affecting the validity or operation of the instrument; and if not to be avoided, are at least to be inserted with care and caution. Others, again, have almost uniformly the effect of invalidating the assignment, and defeating its object.

§ 183. *Special Provisions should be Avoided.*—As a general rule, it is not advisable to multiply special clauses of

any description. If unusual, they always excite suspicion.[1] And even those of an ordinary character are to be inserted with great care, particularly in assignments which give preferences. "Every provision in a voluntary assignment," observed Sergeant, J., in Whallon v. Scott,[2] in allusion to this class of conveyances, "ought to be narrowly scanned and closely watched;" and the courts now almost uniformly act upon this principle. Even clauses directing an assignee to do what is, *prima facie*, his duty to do without them, sometimes give rise to suspicions.[3] And so many instances have occurred of assignments being declared fraudulent and void on account of a single provision, supposed by the draughtsman to be, at most, of a harmless character, that the drawing of a valid assignment has come to be regarded by some as a matter of no small difficulty and hazard. This difficulty was dwelt upon by counsel in the argument of the case of Litchfield v. White,[4] in the Superior Court of the city of New York, and the remarks of Mr. Justice Sandford

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[1] Clauses which are unusual, ought, on that account alone, to excite suspicion. Gaston, J., in Cannon v. Peebles, 2 Ired. L. 449, 455.

[2] 10 Watts, 237, 244.

[3] This was strongly illustrated in a New York case. It had been decided in this State, that an *authority* expressly given to an assignee *to sell* the assigned property *on credit*, avoided the assignment which contained it. Barney v. Griffin, 2 N. Y. 365; Whitney v. Krows, 11 Barb. 198. In Van Rossum v. Walker (11 Barb. 237), the assignment contained a clause (framed perhaps with reference to the previous decision) expressly *prohibiting* the assignee from selling on credit. The assignment was assailed on this very ground, as furnishing evidence of fraud; and the court so far regarded the objection as to hold that such a provision was not, *per se*, evidence of fraud. The following remarks of Edwards, J., explain the ground of the decision: "It is well settled, that, as a general rule, it is the duty of the assignee to dispose of the assigned property at once; and that, when it can be done consistently with the interests of the parties, it should be sold for cash. The question then arises, whether a specific direction to the assignee, to do what is *prima facie* his duty, is, *per se*, evidence of fraud. It may be that such a provision is an unwise one, and one that ought not to be countenanced; and where there are any circumstances which go to show that a forced sale was intended, to the injury of the creditors, it ought to be taken into consideration as an important item of evidence, which, in connection with the other circumstances, would justify this court in setting aside the assignment. But it seems to me that this is all the effect which should be given to such a provision." And see Whitney v. Krows, *ubi supra*.

It has since been determined that such a clause does not invalidate the assignment. Grant v. Chapman, 38 N. Y. 293; Carpenter v. Underwood, 9 N. Y. 520; see Work v. Ellis, 50 Barb. 512.

[4] 3 Sandf. S. C. 545.

in reply so well explained the grounds of it, and how it may be avoided, that they are inserted here as an apt conclusion to the prefatory observations which have just been made. "The whole difficulty consists in the insertion of clauses beyond, or varying, the necessary provisions for transferring the debtor's property, and appropriating it to the payment of his debts. We have never heard of a case, nor do we believe there has ever been one decided in this State, in which an assignment has been held fraudulent which simply vested the debtor's estate in trustees, and directed them to convert it into money, and apply it absolutely and without reserve to the payment of his debts, whether equally among all the creditors or with preferences. But so long as failing debtors will make assignments containing provisions directly or indirectly for their own benefit, to the detriment of their creditors, or vesting in assignees the power of giving preferences, or excluding creditors who will not release the debtor, or exempting the assignee from his proper legal responsibility to those for whom he is to act, or otherwise deviating from the direct appropriation of the assets to the payment of debts, so far as they can be reasonably secured and applied—so long it will be the duty of the courts to pronounce such assignments fraudulent whenever they are presented for adjudication."[1]

The most important of these special provisions, together with their effect, as exemplified by cases decided in the courts, will now be considered.

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[1] 3 Sandf. S. C. 554, 555. In the case of Ogden v. Peters (21 N.Y. 23), Mr. Justice Comstock made the following observations: "An assignment drawn precisely as it ought to be will not undertake to speak to the assignee in regard to his duties under the trust. Those duties, unless the creditors themselves direct otherwise, are simply to convert the estate and pay the debts in the order and with the preferences indicated in the instrument. A trustee is always bound by any restrictions contained in the writing which creates the trust, and if these are inconsistent with the rights of creditors the trust itself must fall to the ground." And see remarks of Mr. Justice Selden to the same effect, in Dunham v. Waterman, 17 N. Y. 9.

I. *Stipulations for the Release of the Debtor as a Condition of the Assignment.*

§ 184. Assignments are sometimes drawn with a stipulation for a *release of the debtor* as the condition of receiving the benefit of the deed; or, in other words, making it a condition that the creditors shall accept the provision made for them in full satisfaction and discharge of their demands. Such a stipulation is, in some cases, introduced as a condition of receiving *any* benefit under the assignment, non-releasing creditors being wholly excluded; in others, as a condition of *preference* over other creditors provided for; and in others, as a condition of sharing in the *surplus* remaining after payment of creditors who are preferred absolutely; and it is sometimes united with a provision expressly reserving the shares of non-releasing creditors to the assignor himself.[1]

In England, a stipulation in an assignment for the release of the debtor, as a condition of receiving the benefit of the deed, has been held valid even against a claim of the crown,[2] and such stipulations continue to be inserted in the forms now in use.[3] In the case of Jackson v. Lomas,[4] there was a proviso to the assignment, that in case any creditor should not execute the trust deed, which contained among other things a release of the debts, by a given day, he should not be entitled to the benefit of it, and his share was to be paid back to the debtor. "It seems to have been assumed throughout that case," observes Chancellor Kent, "that such a provision would not affect the validity of the assignment."[5] It was, in fact, held void on another ground.

In the United States, there is no uniform rule on the subject. In some of the States, assignments with stipula-

[1] On the questions discussed in this subdivision, see Bump on Fraudulent Conveyances, chap. XV.

[2] King v. Watson, 3 Price (Exch.), 6.

[3] See the case of Janes v. Whitebread, 20 L. J. C. P. (N. S.) 217; s. c. 5 Eng. L. & Eq. 481; Forbes v. Limond, 4 DeG., M. & G. 298.

[4] 4 Term R. 166.

[5] 2 Kent's Com. [534] 693.

tions for a release have been sustained to the full length of wholly excluding non-releasing creditors; in others, they have been adjudged valid only so far as they operate to postpone non-releasing creditors to others. In other States, they have been pronounced void under all circumstances.

§ 185. *Releases—Pennsylvania.*—In Pennsylvania, the law was, at one time, settled in favor of the validity of these stipulations to their fullest extent. In the early case of Burd v. Smith,[1] in the High Court of Errors and Appeals, the trustees of the assignment were to dispose of the property and distribute the proceeds ratably among such creditors as should agree, in writing, to accept the same within nine months, and to pay to the assignor the proportion of all such creditors as should not signify their acceptance within the time. The court (two judges dissenting) declared the assignment invalid. But in Lippincott v. Barker,[2] where the assignment was of the debtor's property to trustees for the benefit of such creditors as should, within four months, execute a general release of all demands; after elaborate argument, the deed was held valid.[3] In Pearpoint v. Graham,[4] where the same question arose, it was held by Mr. Justice Washington, in affirmance of the same doctrine, that an assignment in trust for the benefit of such creditors as should release their debts, was founded upon a sufficient con-

[1] 4 Dall. 76, sometimes cited as "Burd v. Fitzsimmons." This case is generally considered to have involved the point of a release of the debtor. Walworth, C., in Wakeman v. Grover, 4 Paige, 23, 39. But one of the justices, in delivering his opinion, said there was no stipulation in the deed for a release in favor of the grantor. Coxe, J., 4 Dall. 92.

[2] 2 Binn. 174. It is to be observed that, in this case, the assignment was first submitted to the creditors of the assignors, at a general meeting, which all but one or two attended, and was accepted by them. A doubt was raised in the case, whether assignments made without the privity of creditors, and excluding all who do not execute releases, are valid on general principles.

[3] In Wakeman v. Grover (4 Paige, 23, 39), Walworth, C., after citing the case of Burd v. Fitzsimmons [Smith], said it was not intended to be overruled by Lippincott v Barker. But the Pennsylvania judges have held otherwise. See In re Wilson, 4 Barr, 430, 441, Coulter, J. And see the explanation given by Tilghman, C. J., and Yeates, J., in Wilt v. Franklin, 1 Binn. 515, 522. In Austin v. Bell (20 Johns. 442, 450), Spencer, C. J., pronounced the case of Burd v. Smith to be expressly in point.

[4] 4 Wash. C. C. 232.

sideration in law. So in the cases of Cheever v. Imlay,[1] Wilson v. Kneppley,[2] Sheepshanks v. Cohen,[3] Bayne v. Wylie,[4] and Mechanics' Bank v. Gorman,[5] assignments containing stipulations for a release were adjudged valid. In the case of Brashear v. West,[6] the Supreme Court of the United States considered the decisions in Lippincott v. Barker and Pearpoint v. Graham, as embodying the settled construction of the Pennsylvania statute of frauds on the subject of assignments, and in accordance with those decisions, pronounced an assignment valid which excluded all creditors from participating in its benefits who should not, within ninety days from its date, execute a release of all claims and demands. In Livingston v. Bell,[7] an assignment in trust for the payment of debts was held good, although it contained a provision excluding all creditors who should not execute a release, and directing the payment to the assignor of the surplus that may remain after satisfying the creditors provided for. In the later case of Lee's Appeal,[8] it was held that the right to stipulate for a release was not taken away by the Pennsylvania act of April 17, 1843, "to prevent preferences in assignments,"[9] and that under that act non-releasing creditors were not entitled to dividends under an assignment in trust for such creditors as should release.[10] But, to make the assignment good in any of these cases, it was uniformly held that it must be of *all* the debtor's property and effects, without reserving, either expressly or by the effect of the assignment, any portion of the effects for the debtor.[11] According to the present law of Pennsylvania, as established

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[1] 7 Serg. & R. 510. [2] 10 Serg. & R. 439. [3] 14 Serg. & R. 35.
[4] 10 Watts, 309. [5] 8 Watts & S. 304. [6] 7 Pet. 608.
[7] 3 Watts, 198. [8] 9 Barr, 504. [9] *Ante*, p. 44.

[10] But in the case of Seal v. Duffy (4 Barr, 274), it was said in argument, and allowed by the court, that clauses for a release were, in effect, expunged by the act of 1843. See the observations of Gibson, C. J., Id. 275. In the case of In re Wilson (4 Barr, 430), nowever, the assignment contained such a stipulation, to which no objection was made, though it was held void on other grounds.

[11] Thomas v. Jenks, 5 Rawle, 221; Hennessy v. The Western Bank, 6 Watts & S. 300; In re Wilson, 4 Barr, 430; Fassitt v. Phillips, 4 Whart. (Penn.) 399; see *ante*, p. 205, note 4.

by the act of April 16, 1849, § 4,[1] any condition in assignment of property made by debtors to trustees, on account of inability at the time of the assignment to pay their debts, within the meaning of the act of April 17, 1843, for the payment of the creditors only who shall execute a release, is required to be taken as a preference in favor of such creditors, and is declared void, and the assignment is to be held and construed to inure to the benefit of all the creditors in proportion to their respective demands.

§ 186. *Releases—Virginia.*—In Virginia, assignments containing stipulations for a release of the debtor, and wholly excluding non-releasing creditors from the benefit of the trust, have been held valid.[2] And the same doctrine has been maintained in South Carolina.[3] In the latter State, however, it has been held that an express reservation of the surplus to the grantor would be fraudulent.[4]

§ 187. *Releases—Maryland.*—In Maryland, stipulations for a release, in assignments of all the debtor's property, as conditions of preference, have been sustained.[5] But the assignment must, on its face and by its terms, convey all the

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[1] Laws of 1849, p. 664; Purd. Dig. (Brightley, 10th ed.) vol. I, p. 90.

[2] Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; Kevan v. Branch, 1 Gratt. 274; Pearpoint v. Graham, 4 Wash. C. C. 232. But this is only where all the debtor's property is conveyed. But this need not appear on the face of the deed. Gordon v. Cannon, 18 Gratt. 387. And where two or three partners conveyed all the effects of the firm and their individual property, and the third had none, a stipulation requiring a release, both of the firm and all the members, by the creditors who accepted the deed, was sustained. Gordon v. Cannon, *supra*; and see 2 Tuck. Com. [442] 431; see Phippen v. Durham, 8 Gratt. 457.

[3] Aiken v. Price, Dudley, 50; Niolon v. Douglas, 2 Hill Ch. 443; Le Prince v. Guillemot, 1 Rich. Eq. 187; Pfeifer v. Dargan, 14 S. Ca. 44.

[4] Niolon v. Douglas, 2 Hill Ch. 443; Jacot v. Corbett, 1 Cheves' Ch. 71.

[5] McCall v. Hinckley, 4 Gill, 128; see Md. Code, art. 48, § 13, p. 346; Rev. Code (1881), p. 719; see *ante*, p. 86. The trusts in this case were, first, to pay in full certain creditors absolutely; second, to appropriate the residue among such of the creditors as should, within ninety days, assent to the assignment, and execute a full release; third, out of the residue, if any, to pay all the other creditors; with a reservation of the ultimate surplus to the grantors. And see Kettlewell v. Stewart (8 Gill, 472), where the assignment was of a similar character. In Hollins v. Mayer (3 Md. Ch. Dec. 343), a trust deed directing the shares of non-releasing creditors to be held subject to the future order and control of the grantor, was held valid. But see Peters v. Cunningham, 10 Md. 554.

property of the grantor, and unless it does so it is void, no matter whether it does in fact convey all his property or not.[1] And when it is made by partners, it must convey all their property, as well their individual estate as ther partnership effects.[2] The whole estate must be surrendered for the benefit of the creditors, and a direction to the assignee to pay over to the grantor the balance remaining after satisfying creditors who execute releases, will invalidate the assignment,[3] and a failure to provide in express terms for the disposition of this surplus among the non-releasing creditors, will be equally fatal.[4]

§ 188. *Releases—Alabama.*—In Alabama, they were at one time held valid to the extent of excluding non-releasing creditors,[5] but, in later cases, this principle has been strongly condemned;[6] and, more recently, a stipulation for a release, coupled with an express reservation of the residue to the grantor in case of non-release, has been held to render the assignment fraudulent and void.[7] But if the debtor assigns all his property, and retains no control over it, and stipulates for no share of the proceeds to result to himself, such a stipulation will be sustained.[8]

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[1] Rosenberg v. Moore, 11 Md. 376; Barnitz v. Rice, 14 Id. 24; Farquharson v. Eichelberger, 15 Id. 63; Green v. Trieber, 3 Id. 11; Sangston v. Gaither, 3 Id. 40; Coakley v. Weil, 47 Id. 277; Maennel v. Murdock 13 Id. 164.

[2] Insurance Co. v. Wallis, 23 Md. 173; Maughlin v. Tyler, 47 Id. 545; Loney v. Bayly, 45 Id. 447; Malcolm v. Hodges, 8 Id. 418.

[3] Bridges v. Woods, 16 Md. 101; Green v. Trieber, 3 Id. 11; Hollins v. Mayer, 3 Md. Ch. 343.

[4] Whedbee v. Stewart, 40 Md. 414; Malcolm v. Hughes, 8 Id. 418.

[5] Robinson v. Rapelye, 2 Stew. 86.

[6] Ashurst v. Martin, 9 Port. 566; Gazzam v. Poyntz, 4 Ala. 374; Wiswall v. Ticknor, 6 Id. 179; Smith v. Leavitts, 10 Id. 92.

[7] Grimshaw v. Walker, 12 Ala. 101; see West v. Snodgrass, 17 Id. 549. In this case the assignment provided that the preferred creditors were not to enjoy its benefit unless they accepted of its provisions in full satisfaction of their debts; and if any of them should refuse to accept, they should be excluded, and the *pro rata* share to which they would have been entitled, had they accepted, should be paid to another specified creditor. It made no provision as to the disposition of any surplus that might remain, in the event that all the preferred creditors should refuse to accept, after paying the debt of the residuary creditor. It was held by the court to be fraudulent and void upon its face.

[8] Rankin v. Lodor, 21 Ala. 380. This is laid down by Phelan, J., as a "settled legal proposition in this State." Id. 389.

Assignments requiring a creditor to make any release or to do any other act impairing his existing rights, before participating in or receiving the securities therein provided for him, are now expressly declared to be fraudulent and void by statute.[1]

§ 189. *Releases—Massachusetts.*—In Massachusetts, there have been several cases before the Supreme Court, where the assignments contained stipulations for a release of the debtor; but there seems to have been no decision made in that court, fully to the point, upon the abstract question of the validity of such stipulations. In the case of Halsey v. Whitney,[2] in the Circuit Court of the United States, Mr. Justice Story observed, that the point appeared not to have met with any direct decision; and so far as the cases examined by him went, they were considered as leaving the question *in equilibrio*.[3] The learned judge, in deciding the case before him, in which he upheld such a stipulation, expressed himself as yielding to what he considered to be the weight of general authority in its favor, though the inclination of his own mind, had the question been new, would have been the other way. In Borden v. Sumner,[4] Parker, C. J., spoke of the question as not then having been decided in the Supreme Court of the State; and in several subsequent cases, in which questions arose upon assignments containing stipulations for a release, this question was not raised.[5] In the case of Nostrand v. Atwood,[6] however, the point was expressly made, the assignment being objected to on the

[1] Rev. Code of Ala. (1876), § 2125.

[2] 4 Mason, 206, 229.

[3] The cases of Widgery v. Haskell (5 Mass. 144); Ingraham v. Geyer (13 Id. 146), and Harris v. Sumner (2 Pick. 129), were considered as inclining against the validity of the stipulation; and those of Hatch v. Smith (5 Mass. 42), and Hastings v. Baldwin (17 Id. 552), as going in its support.

[4] 4 Pick. 265.

[5] Andrews v. Ludlow, 5 Pick. 28; Lupton v. Cutter, 8 Id. 298; Gloucester Bank v. Worcester, 10 Id. 529; American Bank v. Doolittle, 14 Id. 123. As late as the cases of the Brig Watchman (Ware, 232), and Grover v. Wakeman (11 Wend. 187), the question was regarded, out of the State, as an open one.

[6] 19 Pick. 281.

ground that it contained such a stipulation, which, it was said, operated compulsory upon the creditors, and prescribed such conditions for the benefit of the assignors as would render the whole assignment fraudulent and void in law. The assignment was sustained by the court, the stipulation being regarded as wholly immaterial to the rights of the plaintiffs in the case, as there was no property transferred for their benefit. But Dewey, J., who delivered the opinion, observed that it was wholly unnecessary "to pronounce any opinion upon the abstract question of the effect of the introduction into an assignment, of a stipulation for a release by the creditors who become parties to it, in a case where such a stipulation might be prejudicial to a creditor indisposed to assent thereto, and who might thus be deprived of receiving his share of the fruits of the assignment."[1] It is to be observed, that the opinion in this case was adapted to the state of the law when the assignment was executed, which was prior to the statute of 1836. The changes introduced by that and subsequent statutes, have already been noticed.[2]

§ 190. *Releases—Vermont—Maine.*—In Vermont, before the act of November 1, 1843, prohibiting general assignments, stipulations for a release, as conditions of preference, were held valid.[3] So, in New Hampshire, before the act of July 5, 1834, conditions of release were valid.[4] But since that act, which provides for an equal distribution of assigned property, they are considered fraudulent.[5] So, in Maine, before the act of April 1, 1836, stipulations for a release in

[1] 19 Pick. 284.

[2] *Ante*, pp. 33–46. The rule established by the decisions in Massachusetts is considered by the learned authors of the Notes to American Leading Cases, as favoring the validity of these stipulations. 1 Am. Lead. Cas. (Hare & Wall, Notes), 100 [72, ed. 1857].

[3] Hall v. Denison, 17 Vt. 410. But see the act of Nov. 14, 1855, requiring all assignments to be for the benefit of all the creditors in proportion to their respective claims. Laws of 1855, p. 15.

[4] Havens v. Richardson, 5 N. H. 113.

[5] Hurd v. Silsby, 10 N. H. 108.

assignments were judged valid.[1] But under that act it was decided that assignments containing such stipulations were illegal.[2] And it was further held that a clause of release, embodied in an assignment, was inoperative and void; and that a creditor who had executed the assignment, was not precluded from repudiating it, though he might have received several partial payments under the assignment.[3] In the United States District Court of Maine, an assignment with a stipulation for a release, as a condition of participating in the fund, the surplus resulting to the assignor, was held fraudulent.[4] But under the act of March 21, 1844, c. 112, amending that of 1836, and now the law of the State,[5] a debtor may require a release from creditors who become parties to the assignment, and shall forever discharge him from their claims, on his making oath that he has assigned all his estate, real and personal, for their benefit.

§ 191. *Releases—Rhode Island.*—In Rhode Island, stipulations in general assignments, as conditions of preference, have always been allowed.[6] And it has been further held that an assignment of all the debtor's property for the benefit of creditors, with preferences in favor of certain creditors, and with a provision that no creditor shall receive any dividend or profit from the assignment, except upon the condition that he execute a discharge in full of all his claims, and that the dividends of the creditors who refuse such a discharge, shall result to the assignor, is valid.[7] But this is allowed

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[1] Fox v. Adams, 6 Greenl. 245; Canal Bank v. Cox, 6 Id. 395; Todd v. Buckman, 2 Fairf. 41.

[2] Pearson v. Crosby, 23 Me. 261; Wheeler v. Evans, 26 Id. 133.

[3] Vose v. Holcombe, 31 Me. 407.

[4] The Brig Watchman, Ware, 232.

[5] Rev. Stat. (ed. 1871), c. 70, p. 543, § 2.

[6] See Angell on Assignments, 112.

[7] Dockray v. Dockray, 2 R. I. 547; Haydock v. Stanhope, 1 Curt. 471; Nightingale v. Harris, 6 R. I. 321; Sadlier v. Fallon, 4 Id. 490; Allen v. Gardner, 7 Id. 22; see Beckwith v. Brown, 2 R. I. 311.

An assignment provided that the dividends of such creditors as did not execute a release within three months from the date of the assignment, should be paid to the assignors. Certain creditors exhausted their remedy at law against

only in cases free from fraud. In a case in the United States Circuit Court for the Rhode Island District,[1] an assignment made by a debtor who had absconded to a foreign country, carrying with him a large sum of money, and which contained a stipulation for a release, as a condition of obtaining a preference under the assignment, was held to be fraudulent and void as to creditors.

In New Jersey it is provided by statute that creditors who come in under the assignment and exhibit their demands for a dividend, shall be wholly barred from having afterwards any action or suit at law or equity against the debtor or his representatives.[2]

§ 192. *Releases—New York.*—In New York the law is to be considered as definitely settled against the validity of assignments containing a stipulation for the release of the debtor, whether as a condition of receiving *any* benefit under the assignment, or only as a condition of *preference.* The following is a brief review of the cases:

In Hyslop v. Clarke,[3] the assignment was in trust, first, to satisfy a debt due to a particular creditor; second, to pay all the other creditors ratably, on condition of their discharging the assignors from all liability to them; and in case the creditors, or any of them, should refuse to give such discharge, then the last mentioned trust was to cease, and

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the assignors, and filed a bill to establish a lien on the dividends of such non-releasing creditors in the hands of the assignee. *Held* that they were entitled to the relief claimed. Smith v. Millett, 12 R. I. 59; see S. c. 11 Id. 528.

[1] Stewart v. Spencer, 1 Curt. 157.

[2] Act of April 16, 1846; Rev. Stat. (1878), p. 40; Nixon's Dig. (ed. 1868), p. 84, § 14. The entire section reads as follows: "Nothing in this act shall be taken or understood as discharging said debtor or debtors from liability to their creditors who may not choose to exhibit their claims, either in regard to the persons of such debtors, or to any estate, real or personal, not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend, they shall be wholly barred from having afterwards any action, or suit at law or equity, against such debtors or their representatives; unless, on the trial of such action or hearing in equity, the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment, or concealing his estate, real or personal, whether in possession, held in trust, or otherwise." Property subsequently acquired by the debtor is not liable to satisfy such claims. Vanderveer v. Conover, 16 N. J. L. 487.

[3] 14 Johns. 458.

the trustees were directed not to execute it; third, in case of such refusal of the creditors, or any of them, to give such discharge, then in trust (after paying the first-mentioned creditor), to pay the whole of the avails of the property to *such of the creditors as the assignors should appoint*, as soon as such refusal should be known; fourth, to pay the surplus, in any event, to the assignors. The assignment was held by the Supreme Court to be void; the stipulation for a discharge being considered coercive in its character, and the provision reserving to the assignors the right to declare a new trust being viewed as an attempt to retain the power to give future preferences, and, until such new trust should be declared, creating in effect a trust for the assignors themselves.[1]

In Austin v. Bell,[2] the assignment was in trust[3] to pay all the debts of the grantors specified in a schedule annexed, in which the creditors were arranged in six classes, giving preferences according to the classes; provided that the said several creditors should, before a day specified, become parties to the assignment (which contained a release of all their demands), by executing the same; and upon the further trust, that in case any of the said creditors should not, within the time limited, become parties to the assignment, then the grantees (or assignees) should *pay to the grantors* the proportion of such of the creditors as should neglect or refuse to execute the assignment. The court declared the assignment invalid; considering it to be a stronger case of legal fraud than that of Hyslop v. Clark, as it gave to the assignors themselves the absolute disposal of the shares of those creditors who should refuse to execute the assignment, to apply them to their own use, or to pay to their creditors,

[1] See the opinion of Van Ness, J., 14 Johns. 462, 463.

[2] 20 Johns. 442.

[3] The assignment, before declaring this trust, contained certain reservations of moneys for the support of one of the assignors and his family, for a limited time; and which, on the authority of Murray v. Riggs (15 Johns. 571), was adjudged valid; though, on this point, as we shall see hereafter, the decision of the court has since been overruled.

as they pleased. It was pronounced to be "not only an attempt to coerce creditors, and to place the property beyond their reach on execution," but to be "the reservation of property which ought to have been devoted to the payment of their debts, to their own private benefit and use."[1]

In Seaving v. Brinkerhoff,[2] in the Court of Chancery, the assignment was of certain real estate, in trust for the benefit of all the creditors who should prove their debts, but upon condition that each creditor "should seal and deliver a full and complete discharge of his demand." The chancellor held this provision to be rigorous, coercive and unjust; on the ground, however, that it was an assignment of only a part of the debtor's property. This case will be referred to again, in the course of this chapter.

In Wakeman v. Grover,[3] in the same court, the assignment was in trust, first, to pay certain preferred creditors of the first class; secondly, to pay to such creditors of the second class as should, within a specified time, agree in writing to receive such proportion of their debts as could be paid out of the surplus avails of the assigned property, after paying the preferred creditors, in full discharge of their debts; thirdly, to apply the residue to the payment of the creditors of the third class, and all other debts of the assignors; and lastly, to pay the residue, if any there should be, to the assignors. The court held the assignment to be fraudulent and void; and, on error to the Court of Errors,[4] the decision of the chancellor was sustained. It will be seen that this case goes farther than any of the previous cases, laying down the rule broadly, that the requirement of a release from any of the creditors, and as a consideration of preference merely, without any direct reservation of the share of the non-releasing creditors to the assignor himself, avoids the assignment.

In Armstrong v. Byrne,[5] in the same court, for the first

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[1] Spencer, C. J., 20 Johns. 450. [2] 5 Johns. Ch. 329. [3] 4 Paige, 23.
[4] Grover v. Wakeman, 11 Wend. 187. [5] 1 Edw. Ch. 79.

circuit, the trust of the assignment was, to divide the proceeds of the assigned property among the creditors ratably, on condition of their releasing the balance of their debts; excluding non-releasing creditors from all benefits, and directing the shares of the latter to be equally divided among such of the creditors as should accept of the composition. The vice-chancellor declared the assignment void for fraud upon the face of it; pronouncing it to be an attempt to coerce creditors into the debtor's own terms, which was against the policy of the law, and vitiated the assignment entirely.[1]

In Lentilhon v. Moffatt,[2] in the same court, the assignment was of part of the debtor's property in trust for all his creditors, and to be paid to them ratably, as they should respectively execute under their hands and seals a full release and discharge of their respective debts, claims and demands against him, with a proviso that unless all the creditors should accept of the assignment within sixty days, the debtor should have power to appoint so much of the proceeds as might not be accepted by the creditors, to be paid to *such creditors as he might think proper;* and that the said appointment should take effect and go into operation either at the expiration of the said sixty days, or as soon as such non-acceptance could be ascertained. The vice-chancellor held the assignment to be void, as being an attempt to place the debtor's property beyond the reach of his creditors, unless they should agree to accept of it upon the terms proposed; and so, in effect, hindering and delaying creditors.

In the subsequent case of Mills v. Levy,[3] in the same court, the trusts of the assignment were, first, to sell, collect debts, etc.; second, to pay certain preferred debts in full; third, to pay ratably, as far as the proceeds would go, certain debts specified, and all other creditors who should, within six months, agree to release the debtors; fourth, out of the residue, to pay ratably such creditors as might not within

[1] 1 Edw. Ch. 80. [2] Id. 451. [3] 2 Edw. Ch. 183.

the six months agree to release. And, in case none of the creditors referred to in the third and fourth trusts should agree to give such release within the period limited, then the assignees were to apply the proceeds which might remain after satisfying the first and second trusts, to the payment, so far as they would extend, of all the creditors ratably. On a bill filed to overthrow the assignment as fraudulent, on the ground of its trust tending to delay, hinder, or defraud creditors, the vice-chancellor decided against its validity, principally on the authority of the case of Burrall v. Leslie,[1] then lately decided by the chancellor, in which an assignment containing similar trusts was held fraudulent and void.[2]

But where certain creditors had executed a conditional release, on payment of fifty per cent. of their claims, and the debtors failed to comply with the terms of the release, and afterwards executed a general assignment by which they preferred, first, certain confidential creditors; secondly, the creditors who had executed the conditional release, and then directed that the residue of the creditors be paid, this assignment was not regarded as coming within the rule of Wakeman v. Grover, inasmuch as the preference to the releasing creditors was absolute, and there were no terms to be agreed

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[1] Reported in 6 Paige, 445, but the point of the invalidity of the assignment is not noticed in the report. It appears, however, from a copy of the chancellor's order, given in the note to Mills v. Levy, 2 Edw. Ch. 187. The case of Grover v. Wakeman was relied on in the argument before the vice-chancellor, but was not examined by the court, the report of the case not having then been published.

[2] And see the observations of Sandford, A. V. C., in Jackson v. Cornell, 1 Sandf. Ch. 348, 354; and of Selden, J., in Dunham v. Waterman, 17 N. Y. 9. But a release may be stipulated for in a different form. Thus, where, by an arrangement between a debtor and a portion of his creditors, the former assigned his property to trustees, in trust for his creditors generally, and the trustees, in consideration of the assignment, and pursuant to the arrangement, personally bound themselves to the debtor to procure for him a release and discharge from all his creditors, except certain ones who were specified, it was held that the assignment was not conditional or partial, or liable to the objection of being intended to coerce a release from the creditors. Hastings v. Belknap, 1 Den. 190.

Mr. Justice Parker, in the case of Strang v. Spaulding, 38 N. Y. 12, remarks: "The law is undoubtedly well settled that such assignments (in which creditors are preferred *on condition* of their subsequently executing releases of their respective demands) are *mala fide* on their face, and void as against creditors." And see Mr. Justice Fullerton, to the same effect, in the same case, 37 N. Y. 139; and Mr. Justice Monell, in Powers v. Graydon, 10 Bosw. 659.

to, and no conditions to be fulfilled.[1] The creditors were not to be paid *if* they would consent to the compromise, but because they *had* agreed to it.

§ 193. *Releases in Other States.*—In Ohio,[2] North Carolina,[3] Mississippi,[4] Missouri,[5] and Georgia,[6] Texas,[7] and Tennessee,[8] the courts have adopted the principle established by the New York decisions.[9]

In Connecticut[10] and Illinois,[11] the requirement of a release as a condition of participation in the fund assigned, the surplus resulting to the assignor, has been held to be fraudulent, and to avoid the deed; but the cases in these States have not decided the question whether a release being made

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[1] Spaulding v. Strang, 37 N. Y. 135; s. c. 38 N. Y. 9; rev'g s. c. 36 Barb. 310; s. c. 32 Barb. 235; Low v. Graydon, 50 Id. 414; Powers v. Graydon, 39 Id. 548; s. c. 25 How. Pr. 512; Renard v. Graydon, 39 Barb. 548; s. c. 25 How. Pr. 178. See remarks of Savage, C. J., in Hone v. Henriquez, 13 Wend. 243.

[2] Atkinson v. Jordan, 5 Ohio, 178; 5 Ham. 293; Woolsey v. Urner, Wright N. Pri. (Ohio), 606; Barrett v. Reids, Id. 701.

[3] Hafner v. Irwin, 1 Ired. L. 490.

[4] Robins v. Embry, 1 Sm. & M. Ch. 208; Mayer v. Shields, 12 Reptr. 789; see Seale v. Vaiden, 10 Id. 831.

[5] Brown v. Knox, 6 Mo. 302; Drake v. Rogers, Id. 317.

[6] Miller v. Conklin, 17 Ga. 480. In this case, an assignment by a firm in insolvent circumstances, of all their assets, for the use and benefit of such creditors as should, within ninety days, file their claims with the assignee, and release the firm from all liability therefor, was held to be illegal and void as against objecting creditors. See McBride v. Bohanan, 50 Ga. 527; Lay v. Seago, 47 Id. 82; Johnson v. Farnam, 56 Ga. 144; Francis v. Herz, 55 Id. 249; Cohen v. Summers, 54 Id. 501.

[7] Carlton v. Baldwin, 22 Tex. 724; Baldwin v. Peet, 22 Id. 708; Bayne v. Denny, 13 Reptr. 542; but see the statutory provision, § 31*b*, *ante*.

[8] Wilde v. Rawlings, 1 Head (Tenn.), 84.

[9] 1 Am. Lead. Cases (Hare & Wall. Notes), 100 [72, ed. 1867]. See the argument of counsel, in Livermore v. Jenckes, 21 How. (U. S.) 133, 143.

[10] Ingraham v. Wheeler, 6 Conn. 277. This was before the changes introduced by the statute of 1853; see *ante*, p. 27.

[11] Howell v. Edgar, 2 Scam. 417; Ramsell v. Sigerson, 2 Ill. 78. In Howell v. Edgar, it was decided that an assignment which provides that all creditors wishing to become parties to it, shall, within twelve months from the date, affix their signatures thereto, and that the debtor shall not be held liable to pay any creditors who may sign any deficiency that shall remain unsatisfied of their respective demands, is fraudulent and void.

In the case of Conklin v. Carson, 11 Ill. 503, where the assignment required creditors who should come in and receive dividends to release their demands, this provision was considered fraudulent; but an amendment of the obnoxious clause having been made by the parties and creditors, the objection was removed. See Hardin v. Osborne, 60 Ill. 98.

a condition of preference merely, is fraudulent.[1] In Indiana, a stipulation for a release in an assignment not embracing all the debtor's property, has been held to avoid the assignment.[2] In the same case, the court expressed a strong inclination against the validity of these stipulations in general, but waived a decision of that question. In Michigan, the question has been settled in accordance with the New York decisions.[3]

In Arkansas,[4] it is held that a stipulation for a full release from the accepting creditors is not fraudulent, the assignment being of all the property, and no statute interfering.

In Colorado,[5] a condition in the assignment requiring creditors to release the assignor from all claims before receiving any benefits under the assignment, and the surplus returning to the debtor, and not to the non-releasing creditors, renders the deed fraudulent and void.

In California, it is provided by the civil code that an assignment for the benefit of creditors is void against any creditor not assenting to it, if it tend to coerce any creditor to release or compromise his demand.[6]

§ 194. *Stipulations for Release — Summary.* — It has been considered[7] that the weight of American authority

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[1] 1 Am. Lead. Cas. *ubi. sup.*

[2] Henderson v. Bliss, 8 Ind. 100. So an assignment which required each creditor, upon payment of his *pro rata* share of the proceeds, to release his entire debt, was held fraudulent and void. Butler v. Jaffray, 12 Ind. 504; and see McFarland v. Birdsall, 14 Id. 126.

[3] Hubbard v. McNaughton, 43 Mich. 220; see the remarks of McLean, J., in Marsh v. Bennett, 5 McLean, 117, 128, 129. In this case, an assignment containing a provision postponing the payment of such creditors as should commence or have commenced any legal proceedings for the recovery of their claims, until all the other creditors should have been paid in full, was held to be fraudulent and void, as being made with an intent to coerce the creditors into a settlement on the debtor's own terms, by embarrassing and delaying their remedy.

[4] Clayton v. Johnson, 36 Ark. 406; citing numerous cases.

[5] Duggan v. Bliss, 4 Col. 228.

[6] Civil Code of Cal. § 3457.

[7] Angell on Assignments, 114. Mr. Angell remarks that the general practice, and the general current of authority in England are decidedly in favor of introducing such clauses into assignments, and refers to the principal books of precedents in conveyancing. See Bump on Fraud. Con. p. 433.

was in favor of the validity of these stipulations upon general principles, and the decision in Halsey v. Whitney has been relied on as establishing such a proposition.[1] The only American authorities examined in that case were the decisions of the courts in Massachusetts, New York and Pennsylvania. The decisions in Massachusetts were admitted by the learned judge who delivered the opinion of the court, to leave the question *in equilibrio*,[2] and the law was deemed to be settled in that State only by professional opinion, usage and practice.[3] The New York decisions were considered as inapplicable, on the ground that they did not "turn upon the naked point of a release, but upon that as incorporated into a peculiar trust;"[4] and, so far as authority was concerned, the case appears to have been decided on the strength of the Pennsylvania case of Lippincott v. Barker,[5] the case of Pierpont v. Lord,[6] in the Circuit Court, and the English Exchequer case of the King v. Watson.[7]

In Lippincott v. Barker, it will be seen that the assignment had been formally accepted by the great majority of the creditors before it was acted upon, and Chief Justice Tilghman, in delivering his opinion, expressly confined it to the circumstances of that particular case, observing that there were "many and strong objections to deeds of assignment made without the privity of the creditors, and excluding all who do not execute releases."[8] The remaining American

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[1] Angell on Assignments, 105.

[2] 4 Mason, 230.

[3] "When we take into consideration the great length of time during which stipulations of this nature have prevailed in this State without objection, there is much reason to believe that the profession have deemed the law settled in favor of the debtor on this point." 4 Mason, 230. See the observations of Ware, J., in Lord v. The Brig Watchman, Ware, 232; of Sutherland, J., in Grover v. Wakeman, 11 Wend. 199, 200; and of Wright, J., in Atkinson v. Jordan, 5 Ohio, 178.

[4] 4 Mason, 230.

[5] 2 Binn. 174.

[6] 4 Wash. C. C. 232. So cited, the correct title being "Pearpoint v. Graham."

[7] 3 Price (Exch.), 6.

[8] 2 Binn. 182. There was also a strong dissenting opinion by Breckenridge, J., in this case. See opinion of Walworth, C., in Wakeman v. Grover (4 Paige, 23, 39), in which he quotes and relies on the earlier case of Burd v. Smith (4 Dall.

case of Pierpont v. Lord [or Graham], does not appear to have been very closely examined, and is, in fact, pronounced to be "not in point, but probably decided on the general principle." The English Exchequer case of The King v. Watson was held to be decisive.

The weight of Mr. Justice Story's decision in Halsey v. Whitney, is considerably affected by his own free admission, that if the question had been new, and many estates had not been passed upon the faith of such assignments, the strong inclination of his own mind would have been against their validity.[1] The decision itself has been critically examined, and its soundness upon principle questioned in several recent American cases.[2]

In the New York case of Grover v. Wakeman,[3] where the decision was fully discussed, and the English and American decisions reviewed, Mr. Justice Sutherland considered it doubtful on which side the preponderance of authority lay, but the decision in that case, and in the subsequent cases in the same State, already noticed, have clearly settled the rule against the validity of the stipulations in question; and the decisions in Ohio, Missouri, Alabama, Mississippi and Georgia, have thrown great weight into the same scale.

In Brashear v. West,[4] it is true, the Supreme Court of the United States sustained an assignment containing a stipulation for a release; but this was done with marked reluctance,[5] and only because the court felt itself bound by the

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76), as not intended to be overruled by Lippincott v. Barker. And see the opinion of Wright, J., in Atkinson v. Jordan, 5 Ohio, 178. But the Pennsylvania courts have held the contrary opinion. In re Wilson, 4 Barr, 480.

[1] 4 Mason, 280.

[2] See McCall v. Hinckley, 4 Gill (Md.), 228; Lord v. Brig Watchman, Ware, 232; Miller v. Conklin, 17 Ga. 430; and see White v. Winn, 7 Gill, 446.

[3] 11 Wend. 187.

[4] 7 Pet. 608; Marshall, C. J., Id. 614; followed in Clayton v. Johnson, 36 Ark. 406.

[5] The objection that the deed excluded all creditors who should not, within ninety days, execute a release of all claims and demands, was considered the most serious one in the case. The court admitted that the release was not a voluntary one, but was induced by the necessity arising from the certainty of being

construction which had been previously given by the courts of Pennsylvania to the statute of that State.[1] The assignment on which the question arose had been executed in Pennsylvania by a citizen of that State, and the court observe that its validity appears never to have been questioned there. But the inclination of the court is pretty clearly indicated by the expression of Chief Justice Marshall: "We are far from being satisfied that upon general principles such a deed ought to be sustained."

In the case of Marsh *v.* Bennett,[2] in the Circuit Court of the United States for the District of Michigan (June, 1850), the question as to the validity of these stipulations was not formally presented, but the court made use of the reasoning of the adverse cases, in condemning a coercive stipulation of another kind. The opinion of Chief Justice Marshall in Brashear v. West was quoted, and the ground upon which the decision was placed referred to, with the observation that "the argument and expressed opinion of the chief justice on the point considered is adverse to the decision pronounced." After remarking that the question was still an open one in Michigan, the court proceed to quote the opinion and decision of Mr. Justice Story, in Halsey v. Whitney, and seem to adopt his conclusion that the weight of authority was in favor of these stipulations, at least as law for the case when the question should arise.[3]

In the case of Stewart v. Spencer,[4] in the Circuit Court for the District of Rhode Island (June, 1852), the assignment contained a stipulation for a release, as a condition of preference, but it had been made by a debtor who after-

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postponed to all those creditors who should accept the terms by giving the release. And of the objection to the deed on this ground, they say, it "is certainly powerful in its tendency to delay creditors. If there be a surplus, this surplus is placed, in some degree, out of the reach of those who do not sign the release and thereby entitle themselves under the deed. The weight of this argument is felt."

[1] Lippincott v. Barker and Pearpoint v. Graham were relied on.

[2] 5 McLean, 117.

[3] 5 McLean, 128, 129.

[4] 1 Curt. 157.

wards absconded to a foreign country, carrying with him a large sum of money. On this latter ground, and this only, the assignment was held fraudulent and void as to creditors. The court, following the law of Rhode Island, assumed it to be settled law for the case, that a debtor might stipulate for a release by which his future earnings would be discharged; and cited Brashear v. West, and Halsey v. Whitney; although, if such a stipulation was designed to be an instrument of fraud, it would avoid the deed.[1]

In his Commentaries on Equity Jurisprudence,[2] Mr. Justice Story appears to have still inclined in favor of his conclusion in Halsey v. Whitney; but his language is not more confident than in that case,[3] and the authorities cited are few.[4] Taking into consideration the opinion expressed by Chief Justice Marshall, in Brashear v. West,[5] it seems probable that should a case be brought before the Supreme Court of the United States, which could be decided on general principles, and free from the controlling influence of State construction, the decision would be against the right to stipulate.[6]

§ 195. *Stipulations for Release, Excluding Non-releasing Creditors.*—So far as stipulations for a release are coupled with provisions cutting off from *all* participation in the assignment those creditors who refuse to accede to its terms,

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[1] 1 Curt. 162, 163.

[2] Vol. ii, c. 28, § 1036.

[3] "Even a stipulation on the part of the debtor, in such an assignment, that the creditors taking under it shall release and discharge him from all their further claims, beyond the property assigned, will (it seems) be valid and binding on such creditors."

[4] Halsey v. Whitney, 4 Mason, 206; Spring v. South Carolina Ins. Co. 8 Wheat. 268; Pearpoint v. Graham, 4 Wash. C. C. 232; Brashear v. West, 7 Pet. 608; and Wheeler v. Sumner, 4 Mason, 183. But in Spring v. S. C. Ins. Co. the point does not appear to have been made; and in Wheeler v. Sumner, it is expressly said that the assignment contained no such stipulation.

[5] 7 Pet. 608.

[6] In the case of Livermore v. Jenckes, 21 How. (U. S.) 126 (1859), the Supreme Court of the United States sustained an assignment executed in Rhode Island, between citizens of that State, stipulating for releases, but the case went upon the point that the complainant's judgment creditors had not acquired a lien upon the property, the judgment having been obtained and execution issued in New York, subsequent to the removal of the property from that State.

by reserving to the debtor himself the shares to which such creditors, had they agreed to release, would have been entitled, the weight of American authority may now be fairly pronounced to be against their validity.[1] And where, after opposition by creditors, a condition of release is sustained, equity will decree the surplus to the creditors who have not acceded to the deed.[2] But the rule is not so clearly settled against the validity of these stipulations, as conditions of *preference only*, where the non-releasing creditors are left by the assignment to share in any surplus which may remain after the satisfaction of the others. In New York, the decisions have indeed established the rule to this extent; but these have not yet been supported by the prevailing current of decisions in other States; and the general rule, as laid down by Chancellor Kent,[3] is in favor of the right of the debtor to prefer some of his creditors to others, through the medium and by the effect of such a stipulation.

§ 196. *Objections to Stipulations for Releases.*—The objections to the allowance of these stipulations in assignments to trustees, are, first, that they operate by way of *coercing the creditors* into a relinquishment of part of their demands. "The debtor," observes Mr. Justice Story,[4] "surrenders nothing, except upon his own terms. He attempts to coerce his creditors by withholding from them all his property, unless they are willing to take what he pleases to give, or is able to give, in discharge of their debts. This is certainly a delay, and, if the assignment be valid, to some extent a de-

[1] 2 Kent's Com. [534] 693, 694, and note; see also, Miller v. Conklin, 17 Ga. 430; Henderson v. Bliss, 8 Ind. 100; Sangston v. Gaither, 3 Md. 11; Bridges v. Wood, 16 Id. 101; Whedbee v. Stewart, 40 Id. 414; Farrow v. Hayes, 51 Id. 498; Malcolm v. Hodges, 8 Id. 418; Hollins v. Mayer, 3 Md. Ch. Dec. 343; Wilde v. Rawlings, 1 Head (Tenn.), 34; Conkling v. Carson, 11 Ill. 503; Butler v. Jaffray, 12 Ind. 504; Carlton v. Baldwin, 22 Tex. 724; Baldwin v. Peet, 22 Id. 708; Reavis v. Garner, 12 Ala. 661. But see Dockray v. Dockray, 2 R. I. 547; Heydock v. Stanhope, 1 Curt. 471; Gordon v. Cannon, 18 Gratt. 388; Nightingale v. Harris, 6 R. I. 321; and see Allen v. Gardner, 7 Id. 22.

[2] Brashear v. West, 7 Pet. 608; Vaughan v. Evans, 1 Hill Ch. 414; Vernon v. Morton, 8 Dana, 247; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271, 275. But see Hollins v. Mayer, 3 Md. Ch. Dec. 343.

[3] 2 Kent's Com [534] 693, 694; Id. [536] 696, 697, note.

[4] In Halsey v. Whitney, 4 Mason, 206, 228.

feating of their rights." "If he can be allowed," says Vice-Chancellor McCoun,[1] to lock up his property by means of such an assignment, until the creditors comply with his terms, he can successfully delay, hinder and defraud his creditors." The force of this objection lies not in the mere circumstance of stipulating for terms with a creditor, but in so stipulating when the debtor's property is no longer accessible to the debtor's remedies. "If a debtor, with his property in his own hands," observes Mr. Justice Sutherland,[2] "and open to the legal pursuit of his creditors, can satisfy them that it is for their interest, or the interest of any of them, to accept 2*s.* 6*d.* in the pound, and give him an absolute discharge, there is no legal objection to it; they treat upon equal terms; the ordinary legal remedies of the creditor are not obstructed. But the case is materially changed, when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation."[3]

Another objection to assignments containing such a stipulation, is, that they operate to reserve to the *debtor himself* a material and substantial benefit, as the direct result of the transfer; namely, an absolute discharge from his debts.[4] "The debtor," observes Vice-Chancellor McCoun,[5] "does not benefit himself by merely creating a preference of payment amongst his creditors; because he remains liable to the others until all his debts are paid; but if he stipulates for an absolute discharge before a creditor shall have the benefit of the property, he thereby assumes to himself a power over the creditors, for his own personal advantage,

[1] In Armstrong v. Byrne, 1 Edw. Ch. 79, 81.

[2] In Grover v. Wakeman, 11 Wend. 187, 201.

[3] And see, to the same effect, the observations of Assistant Vice-Chancellor Sandford, in Jackson v. Cornell, 1 Sandf. Ch. 338, 354; see also White v. Winn, 8 Gill, 499.

[4] See the observations of Sutherland, J., in Grover v. Wakeman, 11 Wend. 187, 201.

[5] In Armstrong v. Byrne, 1 Edw. Ch. 79, 81.

namely of being discharged from his debts by a payment of a part only."

A third objection to assignments of this character, not less forcible than either of the preceding, is, that they are expressly designed to effect for the debtor a discharge from his liabilities, on *better terms* to himself than *insolvent laws* allow to debtors who apply for their benefit. "The law of this State," observes Chancellor Walworth,[1] "does not recognize any right on the part of an insolvent debtor, to an absolute discharge from his debts, although he may honestly and fairly make a cession of all his property to his creditors, to be applied to the payment of his debts, equally or ratably. Much less does it recognize the right or the justice of such a discharge, where he has singled out favorite creditors, and devoted the mass of his property to the payment of the whole of their debts, leaving the rest of his creditors to come in for a share of the residue. In such a case, he is barred from all relief under our insolvent laws, even if two-thirds of his creditors consent to his discharge. And without such consent, his future earnings are, in all cases, liable for the payment of the balance of the debts, after his property has been fairly distributed among the creditors." Assignments of this character, indeed, secure to the assignor the full result of a *bankrupt law*, in the absolute character of the discharge for which they stipulate; while, at the same time, they avoid complying with the essential requisite to a bankrupt discharge, namely, an entire and unconditional surrender of property; the debtor thus making, in the language of Chief Justice Parsons,[2] "a bankrupt law for himself."

§ 197. *Stipulations for Releases in Partial Assignments.*—What has been said thus far, as to the validity of stipulations for a release in assignments by debtors, is to be understood as applying exclusively to *general* assignments.

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[1] In Wakeman v. Grover, 4 Paige, 23, 38.

[2] In Widgery v. Haskell, 5 Mass. 144, 152; and see Thomas v. Jenks, 5 Rawle, 221, Gibson, C. J.; Miller v. Conklin, 17 Ga. 430, 432, 434, Starnes, J.; Henderson v. Bliss, 8 Ind. 100, 103, 104, Perkins, J.

In regard to *partial* assignments, there is much more uniformity in the decisions, it being held, almost without exception,[1] that such a stipulation in an assignment of part of the debtor's property, is fraudulent.[2] The rule, to this extent, has been laid down in no State more strongly than in Pennsylvania, where such stipulations in general assignments were, previous to the statute, invariably sustained. Thus, in Thomas v. Jenks,[3] it was held that an assignment by partners, of the partnership effects, and not of their separate property also, if it contain a condition that the creditors shall release their claims against the assignors, individually and as copartners, is fraudulent and void. In Hennessy v. The Western Bank,[4] it was held that an assignment by copartners, stipulating for a release, was not valid without containing a transfer of the separate property of each of the partners, though it might not appear affirmatively that a partner who omitted to execute the deed had separate property. In the subsequent case of In re Wilson,[5] it was decided that a general assignment by two partners, stipulating for a release to themselves and a third partner, was fraudu-

[1] The rule in Massachusetts is considered to be an exception. 1 Am. Lead. Cases, 94, citing Nostrand v. Atwood, 19 Pick. 281. In the case of Stewart v. Spencer (1 Curt. 157), Mr. Justice Curtis seems to have inclined to the opinion that an assignment of part of a debtor's property for the benefit of all his creditors, stipulating for a release, was not void by the law of Rhode Island. The language of the learned judge, after citing the New York and Pennsylvania cases, is as follows: "Although it is difficult to resist the force of some of the reasoning in these cases, I am not prepared to say that such a deed is necessarily fraudulent on its face. If the property not conveyed by the assignment is left within the reach of creditors, if no actual fraudulent intent by the debtor existed, and, upon the whole case, it appears that the instrument was not designed to aid any fraud, and could not so operate, because in point of fact, no fraud was either practiced or intended, perhaps it would be going too far to say that, under the laws of Rhode Island, such an instrument would be void." Id. 166. The learned judge further expressed his opinion that "the only possible question as to the soundness of these decisions, arises from the fact that they hold the presumption of fraud to be conclusive, and refuse to look beyond the instrument." Id. ibid.

[2] Seaving v. Brinkerhoff, 5 Johns. Ch. 329; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; Green v. Trieber, 3 Md. 11; Sangston v. Gaither, Id. 40; and see *ante*, chap. X.

The act of April 17, 1843, applies to partial as well as general assignments, and such assignments inure to the equal benefit of all creditors. Miner's National Bank Appeal, 57 Penn. St. 193.

[3] 5 Rawle, 221; and see Henderson v. Bliss, 8 Ind. 100.

[4] 6 W. & S. 300.

[5] 4 Barr, 430.

lent on its face, though the non-assenting partner had no estate but such as passed to the assignee. The opinion of the court was expressed by Mr. Justice Rogers, in language peculiarly strong and emphatic.[1] In the still later case of Weber v. Samuel,[2] the preceding cases were relied on; and it was held that an assignment by the members of a firm, purporting to convey merely the partnership goods and effects, with certain specific real estate, in trust for certain preferred creditors, and then in trust for such as should execute a release, while it contained no words of conveyance of the private or individual estate of either member of the firm, and did not even purport to convey all the real estate of the firm, was invalid.[3]

In Maryland, the rule is established, that an assignment for the benefit of creditors, exacting releases as the condition on which they may participate in the fund, must transfer all the debtor's estate, and this must appear affirmatively upon the face of the deed.[4]

In South Carolina, an assignment of part of the debtor's property to such creditors as should release, the surplus to be divided among the creditors generally, where the existence of a residue was concealed by the debtor, has been con-

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[1] See *ante*, p. 205, note 4. It was further said in this case (4 Barr, 449), that Thomas v. Jenks and Hennessy v. Western Bank introduced no new principle, but were nothing more than a correct application of a principle already settled in McAllister v. Marshall, 6 Binn. 338; Passmore v. Eldridge, 12 S. & R. 201; Adlum v. Yard, 1 Rawle, 163; Johnston's Heirs v. Harvey, 2 Penn. 92; and McClurg v. Lecky, 3 Penn. 83.

[2] 7 Barr, 499.

[3] The objections to *conditional* assignments, in general, have been very forcibly expressed by Sutherland, J., in Grover v. Wakeman, and Gibson, C. J., in Thomas v. Jenks. The eminent judge last named observed, in the case referred to, "It is difficult, at a glance, to reconcile the mind to the decisions in support of these conditional assignments in any case, or comprehend how a conveyance which puts the debtor's property beyond his creditor's reach, except on terms prescribed by himself, can be anything else than an act to 'delay, hinder, and defraud,' within the purview of the 13 Elizabeth." And see the opinion of Gaston, J., in Hafner v. Irwin, 1 Ired. L. 490, 499, 500.

[4] Sangston v. Gaither, 3 Md. 40; Green v. Trieber, Id. 11; Rosenberg v. Moore, 11 Id. 371; Barnitz v. Rice, 14 Id. 24; Farquharson v. Eichelberger, 15 Id. 63; Insurance Co. v. Wallis, 23 Id. 173; Coakley v. Weil, 47 Id. 277; Maennel v. Murdock, 13 Id. 164; Maughlin v. Tyler, 47 Id. 545; Loney v. Bayly, 45 Id. 447.

sidered to be fraudulent in fact;[1] and a reservation to the grantor of the surplus, after paying to releasing creditors forty per cent., if the estate would yield as much, was decided to be fraudulent.[2]

But in a case in Rhode Island, where the grantor preferred certain creditors by giving one class thirty per cent. and another fifteen, and turning the balance over to the general creditors, when it was plain that no interest would result to the grantor, the assignment was sustained.[3]

As regards the *manner* of stipulating, it is effected, on the part of the creditors, either by executing the assignment containing a release, or by executing a separate agreement to release.[4] The former is the usual practice. The particular form of the release to be given is sometimes prescribed in the assignment, and such a provision has been held valid.[5] It is necessary, also, to specify a time within which the release is to be executed;[6] and this period must be a reasonable one,[7] neither too long[8] nor too short,[9] otherwise the assignment will be considered fraudulent.[10]

The deed should in such cases give to the creditors all the information in the power of the debtor as to the nature and value of the property conveyed, and the amount of the debts intended to be provided for, in order to enable the creditors to determine whether they will accept or reject the assignment.[11]

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[1] Le Prince v. Guillemot, 1 Rich. Eq. 187.

[2] Jacot v. Corbet, 1 Cheves' Ch. 71. [3] Nightingale v. Harris, 6 R. I. 331.

[4] This was the form in Ludwig v. Highley, 5 Barr, 132.

[5] Bayne v. Wylie, 10 Watts, 309.

[6] Pearpoint v. Graham, 4 Wash. C. C. 232; Henderson v. Bliss, 8 Ind. 100; 2 Kent's Com. [533] 693.

[7] In Halsey v. Whitney, six months was held not to be an unreasonable time. Nine months has been considered too long. Burd v. Smith, 4 Dall. 76. The unreasonableness of the period of limitation will depend on circumstances. 2 Kent's Com. [533] 693, note a. Ninety days is a common period.

[8] Pearpoint v. Graham, 4 Wash. C. C. 232.

[9] Fox v. Adams, 5 Greenl. 245; Ashurst v. Martin, 9 Porter, 566.

[10] 2 Kent's Com. [533] 693; and see *post*, V, in this Chapter.

[11] Gordon v. Cannon, 18 Gratt. 387.

II. *Reservations of Benefit to the Debtor.*

§ 198. In the largest sense of the term "reservation," comprehending any benefit secured to the debtor, immediately or ultimately, by implication or in express terms of the instrument, this division may be considered to include not only the previous head of "stipulations for a release," but most of the provisions which form the subject of the present chapter. But the reservations now proposed to be considered are those which are directly made to the debtor, by express provisions for the purpose.

"When a debtor fails," it has been well observed,[1] "his property, in moral justice, belongs to his creditors." Assignments of his property, therefore, considered as modes of provision for creditors, should in all cases be, actually and to the full extent, what (as usually designated) they profess to be—for the *benefit of the creditors*, and not for the benefit of the *debtor himself*, at their expense. Hence, it is a settled general rule in American law, that a clause or provision in an assignment by which any benefit or advantage is reserved to the debtor at the expense of the creditors, whether such benefit be temporary or permanent, whether it be in the shape of payment of a gross or annual sum, employment at a compensation, or otherwise, and whether reserved to the debtor himself, or for the support of his family—is a fraud in law, and vitiates and avoids the whole assignment.[2]

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[1] Savage, C. J., in Mackie v. Cairns, 547, 580.

[2] Rogers, J., in McClurg v. Lecky, 3 Penr. & W. (or Penn. R.) 88, 91, 93; Ingraham v. Grigg, 13 Sm. & M. 22, 27; Mackie v. Cairns, 5 Cow. 547; Harris v. Sumner, 2 Pick. 129; Richards v. Hazard, 1 Stew. & P. 139; Bronson, J., in Goodrich v. Downs, 6 Hill (N. Y.), 438, 439. "To say that an insolvent debtor can put any portion of his property, not exempt by law, beyond the reach of creditors for his own benefit, is a monstrous proposition." Id. ibid. And see Gazzam v. Poyntz, 4 Ala. 374. A debtor cannot stipulate in the deed for any benefit to himself. He has no right to make such a reservation at the expense of his creditors, and with intent to defraud them. Stokes v. Jones, 18 Id. 734, 737. And see Sheppards v. Turpin, 3 Gratt. 373; Leadman v. Harris, 3 Dev. 144; Byrd v. Bradley, 2 B. Mon. 239; Henderson v. Downing, 24 Miss. 106; Green v. Trieber, 3 Md. 11; Waldron v. Wilcox, Index P. (R. I.) 128.

In Cheatham v. Hawkins (76 N. Ca. 335), it is said: "An assignment cannot cover up and preserve the property for the debtor's use or protect it from the remedies and demands of the creditors. Here is not only a retention of posses-

§ 199. *Reservations of Property.*—Thus, in Massachusetts, where the assignment contained a reservation to the debtor, in the form of an agreement that the trustees might pay to him the sum of one thousand dollars, or a certain proportion of it, in a certain event, it was held void on this account.[1] So, in New York, where several assignments had been made, all subject to the trust to pay to the assignor, for the support of himself and family, at the rate of two thousand dollars per annum for a limited time, they were held void *in toto* as being a fraud upon creditors.[2] So, in Pennsylvania, where a debtor conveyed his property to his sons, in trust to pay off certain judgments, and then to maintain the grantor and his wife as long as they should live, and the rest of his family until they should be able to maintain themselves, the deed was held to be fraudulent and void as against creditors.[3] And it is immaterial whether such reservation for the debtor or his family be expressed on the face of the assignment or not, or whether it is made in a direct or indirect form. Thus, in Pennsylvania, an assignment of all the debtor's property, with an understanding that part of the property assigned should be reconveyed to trustees for the benefit of the debtor's family, was held, so far as respected that part of the property, to be fraudulent and void as to all creditors who did not assent to the arrangement, though the assenting creditors' claims might exceed the amount of the property assigned; and the dissenting creditors might take it in execution.[4] And where a debtor executed an assignment of all his estate and effects (being a certain factory and machinery, &c.), and an agreement was entered into between

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sion by the assignor, which is presumptive evidence of fraud, but there is the further power to dispose of it for the debtor's benefit, and still more, the exercise of that power annihilates the thing itself. We have, then, one of the strongest cases of presumptive fraud."

[1] Harris v. Sumner, 2 Pick, 129.

[2] Mackie v. Cairns, Hopk. Ch. 373; 5 Cow. 547. So a *sale* of land by one indebted at the time, in consideration of supporting his family, is fraudulent and void as to creditors. Jackson v. Parker, 9 Cow. 73.

[3] Johnston's Heirs v. Harvey, 2 Penr. & W. (or Penn. R.) 82.

[4] McAllister v. Marshall, 6 Binn. 338.

him and his assignees, by which they agreed to employ him as agent in conducting the business, and to allow one-third of the profits for his support and that of his family; and it was further agreed that in case of the death of the assignor, or of his being otherwise prevented from managing the factory, another agent was to be employed by the assignees, who was to be paid a reasonable salary out of the third of the profits allowed to the assignor—it was held in the same State that the stipulation rendered the assignment fraudulent and void.[1] So in New York, an understanding, though not expressed in the assignment, that the assignee should allow to the assignor a weekly sum for his services, the same being nominal, was held to be evidence of fraud.[2] In North Carolina, where a debtor, upon being applied to by a *bona fide* creditor to secure him by a deed of trust on his property, refused to secure any part of the debt unless the creditor would transfer one-half to a trustee for the benefit of the debtor's wife and children; and that the half so transferred should also be secured by such deed; and the creditor, though reluctantly, consented—it was held that this was tantamount to a reservation by the debtor himself of so much of his property for the use of his wife and children, and was therefore fraudulent and void as against other creditors.[3] In Virginia, where an assignment contained a stipulation that the debtor should be allowed to have possession

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[1] McClurg v. Lecky, 3 Penr. & W. (or Penn. R.) 83. But where a debtor made an assignment of his personal property to a creditor, and at the same time made a distinct agreement with the creditor for the employment of his apprentices, whose wages were to be paid to the debtor, it was held that, as the contract was collateral to the assignment, and afforded the only mode by which the wages of the apprentices could be reached on execution, the assignment was not on that account void. Faunce v. Lesley, 6 Barr, 121.

[2] Currie v. Hart, 2 Sandf. Ch. 353.

[3] Kissam v. Edmonston, 1 Ired. Eq. 190. The reason of the doctrine on this point is well expressed by Ruffin, C. J., who delivered the opinion of the court in this case. A creditor may, out of a debt due to him, or any property belonging to him, give a bounty to the family of his debtor, or to the debtor himself; but it must be a voluntary act, not coerced by the debtor; nor made the price of any favor or preference by the debtor towards such creditor. It must be independent of any arrangement between the debtor and creditor at the time, or as a part of the contract to convey the property. Id. 183.

of the assigned property for sixteen months, and should be considered the agent of the trustee, with full power and authority to sell or dispose of any of it, it was, for this and other reasons, held fraudulent on its face.[1] And in Mississippi, where a deed, beside extending the time of payment for five years, contained a stipulation that the family expenses of the grantors should be paid out of the product of the property conveyed, before payment of any part of the debts—it was held to be void upon its face.[2]

So, in Kansas, where the assignment made provision for the payment of a claim in which, by previous arrangement, the assignor had an interest, this was such a secret reservation for the benefit of the assignor as to render the assignment void.[3] And in another case in the same State, where the assignment by its terms reserved to the assignors $800 worth of the property assigned to be afterwards selected by the assignors themselves, it was held to be void upon its face.[4]

But the fact that an assignment contemplates that the planting operations of the debtors shall be continued for the current year under their supervision, and that future advances, to continue such operations, shall be made by a creditor, is not inconistent with an absolute unconditional appropriation of the property to the payment of debts; nor is it, in effect, a reservation for the use of the debtor.[5]

§ 200. *Trusts for the Assignor.*—The general rule on the subject of these reservations for the benefit of assignors (and which is one of the most important in the whole law of voluntary assignments), may be very comprehensively expressed

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[1] Spence v. Bagwell, 6 Gratt. 444. But in the later case of Dance v. Seaman, in the same State (11 Gratt. 778), where a deed of trust was not to be enforced for two years, and the profits were in the meantime reserved to the grantor, the possession also remaining with him—it was held to be not fraudulent *per se*, though made without the knowledge of the creditors. See the observations on the case of Spence v. Bagwell, by Allen, P., 11 Gratt. 783.

[2] Henderson v. Downing, 24 Miss. 106, 117; and see Johnson v. Thweatt, 18 Ala. 741.

[3] Kayser v. Heavenrich, 5 Kan. 324. [4] Clark v. Robbins, 8 Kan. 574.

[5] Perry Ins. & Trust Co. v. Foster, 58 Ala. 502.

in the language of the decision in Mackie v. Cairns,[1] viz.: that an insolvent debtor can make no assignment of any part of his property *in trust for himself*.[2] And this rule is so rigidly enforced in New York, that an assignment containing such a trust is held void, not only for the portion reserved, but for the whole.[3] And even a distinct security, such as a judgment, intended to come in aid of an assignment which contains such a provision, is, by the effect of such connection, rendered void also.[4] And in Goodrich v. Downs,[5] it was held that where, on a trial before a jury, an assignment shows, *on its face*, that it was made in trust for the use of the assignor, either in whole or in part, the court is bound to pronounce the transaction void, without submitting the question to the jury. So, in Pennsylvania, a fraudulent trust of this kind avoids the assignment *in toto*, and the property which is made the subject of it, is held to remain in the debtor, liable to the execution of those creditors who have not assented to the assignment.[6]

In New York, it has been expressly provided by statute, that "all deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making

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[1] 5 Cow. 547, 548; see Kingman, C. J., in Kayser v. Heavenrich, *supra*; Roosevelt, J., in Nichols v. McEwen, 17 N. Y. 22; Seldon, J., in Jessup v. Hulse, 21 N. Y. 168.

[2] Id. ibid.; Goodrich v. Downs, 8 Hill (N. Y.), 438; Shaffer v. Watkins, 7 W. & S. 219; Greed v. Trieber, 3 Md. 11; Hoopes v. Knell, 31 Id. 550; Banks v. Clapp, 12 Ga. 514; Wheeler, J., in Wright v. Linn, 16 Tex. 34, 42; and see *post*, Chap. XXV.

[3] Mackie v. Cairns, 5 Cow. 547.

[4] Mackie v. Cairns, 5 Cow. 547; reversing on this point the decision of the court below. D'Ivernois v. Leavitt, 23 Barb. 63, 64. Where the debtor authorized the assignees to use a judgment previously confessed by him, to secure them against contingent liabilities as his sureties, for the purpose of perfecting title to his real estate, declaring that all that should be realized from the real estate should be assets in the hands of the trustees to be distributed according to the terms of the assignment, but he did not assign his statutory right of redeeming the land from a sale on the judgment, or his right to the rents and profits before the expiration of the period of redemption—held that this was not such a reservation of property as vitiated the assignment. Dow v. Platner, 16 N. Y. 563.

[5] 6 Hill (N. Y.), 438; but see Curtis v. Leavitt, cited *infra*.

[6] McClurg v. Lecky, 3 Penn. & W. 88; see McAllister v. Marshall, 6 Binn. 338.

the same, shall be void as against the creditors, existing or subsequent, of such person."[1] And similar provisions have been enacted in other States.[2] The New York statute (which has been recently termed "the statute of personal uses," and "the personal statute of uses,")[3] was expressly relied on in the case of Goodrich v. Downs, as the ground of the decision. But in the case of Curtis v. Leavitt,[4] in the New York Court of Appeals, it was held that this statute applied only to conveyances wholly or primarily for the use of the grantor, and not to instruments for other and active purposes, such as to secure debts or procure money on loan, where the reservations are incidental and partial only; and the case of Goodrich v. Downs, so far as it maintains the contrary, was overruled. It was further held that if the statute could be applied to the latter description of cases, it avoids only so much of the grant as is not sustained by the valid purposes for which it was made; it does not avoid the entire instrument which contains the invalid use. But, so far as the case of Goodrich v. Downs applies to ordinary assignments by insolvent debtors, its principle seems to have been clearly recognized, the court holding that if an assignment is made by a debtor, when in failing circumstances, which looks to a final liquidation, and implies an inability to meet his engagements, it will be invalid unless it is an unqualified devotion of the assets assigned to the payment of all his debts, without any reservation of an interest therein, to the prejudice of his creditors.[5]

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[1] 3 Rev. Stat. (7th ed.) p. 2327, § 1.

[2] Indiana—Statutes of Indiana, vol. I, p. 353, § 18; R. S. of Ind. (1881), § 4921. Michigan—Compiled Laws (ed. 1871), vol. II, p. 1456. Minnesota—Statutes at Large (ed. 1873), vol. I, p. 692, § 14; Stat. of Minn. (1878), p. 548. New Jersey—Revised Statutes, p. 499, § 1; Rev. of N. J. (1878), p. 446; Nixon's Digest (ed. 1868), p. 355, § 1; and in other States; see *post*, Chap. XXV.

[3] Curtis v. Leavitt, 15 N. Y. 119, 147, 149.

[4] 15 N. Y. 9.

[5] Paige, J., 15 N. Y. 208; Comstock, J., Id. 132. In Collomb v. Caldwell, 16 N. Y. 484, Mr. Justice Comstock made use of the following language: Goodrich v. Downs, so far as it may have been understood to have turned upon the statute (2 R. S. 135, § 1) relating to conveyances "in trust for the use of the person making the same, has been overruled by this court (Curtis v. Leavitt, 15 N. Y. 9).

§ 201. *What Reservations are allowed.*—But the rule against the reservation of benefits to the assignor, in deeds of assignment, has not always been inflexibly applied by the courts, without regard to amount or circumstances.[1] Thus, in Virginia, where the grantor reserved the sum of three hundred and fifty dollars to his individual use and disposition, for the purpose of paying some small claims due from him, of high honorary obligation, which were not then liquidated or specifically ascertained, it was held that such reservation did not of itself avoid the deed.[2] And clauses in assignments, giving the trustees power, *if they think proper*, to employ the debtor as agent or manager of the property, for a limited time, and in subordination to the objects of the assignment, have been held valid. Thus, in Alabama, a deed conveying a plantation to trustees for the benefit of creditors, was held not to be void on account of a provision that the trustees might, if they thought proper, permit the grantor to have the management of it, under their supervision, until the growing crop was sold.[3] And in England assignments are constantly drawn with clauses enabling the trustees to employ the debtor in winding up his affairs, and in collecting and getting in his estate and effects, and in

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But in overruling the decision in that respect, we by no means called in question the doctrine that an assignment by an insolvent is void for actual fraud, if, while he provides for only a part of his creditors, he makes the attempt in the instrument to reserve any portion of the fund to himself. In this view of the question, Goodrich v. Downs was well enough decided, and the decision depending upon this principle was approved in Barney v. Griffin (2 N. Y. 365)." See McClelland v. Remsen, 36 Barb. 622.

[1] 1 Am. Lead. Cases (Hare & Wall. Notes), 98 [70, ed. 1857].

[2] Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; and see Dance v. Seaman, 11 Gratt. 778. In a case in England, where the assignment provided that the trustees might make the debtor such allowance, or return to him such part of his household furniture or effects, not exceeding the value of 20*l*, as they might deem expedient, it was sustained. Coate v. Williams, 21 Law J. Exch. (N. S.) 176; s. c. 9 Eng. L. & Eq. 481.

[3] Planters' & Merchants' Bank of Mobile v. Clarke, 7 Ala. 765; Rindskoff v. Guggenheim, 3 Cold. (Tenn.) 284. But in Constantine v. Twelves, 29 Ala. 607, where the debtor reserved the possession of a stock of goods assigned, with the right to carry on the business and sell the goods, accounting only for the proceeds, this was held to create a presumption of fraud, which, unless rebutted, would render the deed void.

carrying on his trade; and to allow him, out of the trust estate, such sum as they may deem proper.[1]

Such employment of the debtor by the trustees, of their own accord, is usually less objectionable in itself, and has been frequently sustained, as will be more fully shown under a future head. But if he be permitted, as their agent, to use and control the assigned effects in a manner wholly inconsistent with the purposes of the trust, and as his own, it will be evidence that the assignment was not made in good faith.[2] And in a case in Alabama, where, on the same day with the execution of a deed of trust by the debtor, a power was executed by the trustees to him, by which they appointed him their agent to sell the goods, collect the debts, compound with the creditors of the concern, &c., vesting in him the most ample powers, the court say: "If these deeds can be considered as one act, we should be strongly inclined to think it would, of itself, be conclusive evidence of a fraudulent intent, as it would, in effect, be the same thing as if this power had been reserved in the deed itself."[3]

§ 202. *Reservations or Exceptions of Property.*—There seems to be a distinction between provisions in assignments, excepting from the operation of the conveyance itself a certain portion of the property for the use of the debtor, and reservations of a benefit out of the property after it has been assigned; and the former have, in some cases, been held not to vitiate the assignment.[4] But as exceptions of this kind

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[1] See Janes v. Whitbread, 20 Law J. C. P. (N. S.) 217; s. c. 5 Eng. L. & Eq. 431; Coate v. Williams, *ubi supra*. The deeds in these cases are said by the court to be "the ordinary printed forms,"—"stereotyped deeds, to be had at any law stationers in London." Coate v. Williams, *ubi sup.*

[2] Smith v. Leavitts, 10 Ala. 92.

[3] Ormond, J., in Smith v. Leavitts, 10 Ala. 92, 105.

[4] Thus, property encumbered beyond its value (Fassett v. Phillips, 4 Wheat. 399), or of small value (Phippin v. Durham, 8 Gratt. 457; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271), so a claim in suit against certain persons, there being no reservation to the assignor. Carpenter v. Underwood, 9 N. Y. 520; *contra*, Baker v. Crookshank, 1 Phila. 193; see Knight v. Waterman, 36 Penn. St. 258; Hickman v. Messenger, 49 Id. 465.

are usually inoperative, and sometimes fatal, they are of very questionable propriety, and ought to be avoided.

The reservation of such property as is exempt by law from levy and sale under execution, is consistent with the rights of creditors.

§ 203. *Stipulations for the Use of Property.*—Stipulations that the debtor making the assignment may *retain*, for a time, *possession* of the assigned property, so as to have the *use* of it, appear to fall under the head of reservations for the debtor's benefit, though, in some instances, such stipulations have been sustained. Thus, in Massachusetts, prior to the changes introduced by statute, a covenant in a general assignment, that the assignor should be permitted to use and occupy the property, committing no waste thereon, until it should be sold or disposed of in the due execution of the trust, was held to be not, *per se*, fraudulent (though possession might be evidence of fraud), as against creditors not parties to the assignment.[1] So in Virginia, a provision that the grantor should remain in possession for six months was held not to be fraudulent.[2] But where a deed of trust contained a stipulation that the debtor should be permitted to remain in possession of the property, and to use the same and enjoy the profits thereof for sixteen months, and that he should be considered the agent of the trustee, with full power and authority to sell or dispose of any of the property conveyed at private or public sale for cash, and to give title thereto, and to collect the proceeds of sale, upon condition that he should immediately pay over the same to the trustee, and provided also that any creditors intended to be secured by the deed, who should during that time proceed by suit or by any legal process whatever against the debtor for the recovery of their respective debts, should be debarred from any right or benefit under the deed—the deed was held, in the

[1] Baxter v. Wheeler, 9 Pick. 21. In Russell v. Woodward (10 Pick. 448), the assignment contained a similar stipulation, which was made a formal ground of objection to it on the argument, but the court took no notice of the objection.

[2] Kevan v. Branch, 1 Gratt. 274.

same State, to be fraudulent upon its face.[1] In North Carolina, a stipulation in the deed for possession by the debtor for a long time, has been distinguished from a mere retention of possession by the sufferance of the trustee and creditors, it being an express trust for the debtor, which might lead to great abuses if tolerated, and must be *prima facie* fraudulent unless the period should be so short as to leave it indifferent whether it was for the convenience of the trustee or the benefit of the estate on the one hand, or, on the other, for the benefit of the debtor.[2]

In Alabama, a deed of trust, providing for the security of creditors designated in the deed, but providing also that the debtor should retain the use of the property until a day subsequent to that when the debts were due, was held to be invalid as a conveyance without the assent of all the beneficiaries, the contrary not being expressed in the deed.[3] And in another case, it was further held that, until such assent, the property conveyed is liable to execution against the grantor.[4] And where a debtor conveys property in trust, as security for certain creditors, reserving the use of perishable effects which might be consumed in the use, it was held in the same State that any other creditor might notwithstanding have all the debtor's estate reduced at once to its money value over and above the amount of the debts secured.[5] It has also been held that an assignment which, after empowering the trustee to expose the property to sale on the best terms practicable, either at private sale or public auction, for cash or on credit, as should, in his opinion, most comport with the interest of all parties concerned, required

[1] Spence v. Bagwell, 6 Gratt. 444, 450. See Dance v. Seaman (11 Id. 778), where this case was commented on. As the practice in Virginia, in cases of deed to trustees for the purpose of selling and paying debts, is for the debtor to remain in possession until a sale can be made, a mere stipulation to that effect in the deed seems not objectionable. See 1 Tuck. Com. [338, 340] 328, 330; see Sipe v. Earman, 26 Gratt. 563.

[2] Ruffin, C. J., in Hardy v. Skinner, 9 Ired. L. 195. For the rule in Tennessee, see Galt v. Dibrell, 10 Yerg. 146.

[3] Lockhart v. Wyatt, 10 Ala. 281.

[4] Hodge v. Wyatt, Id. 271. [5] Graham v. Lockhart, 8 Id. 9.

him, if the property was not sold within six months, to sell it at public auction, &c., was not rendered fraudulent on its face by a provision that the debtor should retain possession of some of the property conveyed until a favorable opportunity for the sale of it should offer, such possession being expressly limited to the time for the sale at public auction.[1] And in another case, a deed of trust for the benefit of creditors, conveying all the debtor's estate, was held not to be rendered fraudulent upon its face by a stipulation contained in it that the grantor should retain the possession of his dwelling-house and the slaves conveyed, until the trustees, in the exercise of the discretion conferred upon them, should think proper to sell.[2] And in another case, a deed of trust was held not to be fraudulent on its face which was made without the knowledge of the preferred creditor, whose debt was past due, and which reserved to the grantor the use of the property until the creditor ordered a sale.[3] But where a deed of trust executed by an insolvent debtor conveyed all his property in trust to secure the payment of a portion of his debt, then past due, leaving other creditors unprovided for, and stipulated that the grantor should retain the possession of all the property until the law-day of the deed, and for such longer period as the sale might be postponed by the secured creditors, and that the surplus, after paying the secured debts and expenses, should be refunded to him—it was held to be fraudulent and void in law as against the unsecured creditors.[4]

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[1] Abercrombie v. Bradford, 16 Id. 560.

[2] Shackelford v. P. & M. Bank of Mobile, 22 Id. 238.

[3] Lanier v. Driver, 24 Ala. 149.

[4] Montgomery's Ex'rs v. Kirksey, 26 Ala. 172. Chief Justice Chilton, in delivering the opinion of the court in this case, observes: "It is not permissible for any one thus to avail himself of a part of his indebtedness, to tie up all his property and exempt it from liability for his other debts, while he has the temporary benefit of the use of it, and a contingent residuum. Such assignments, when these facts appeared on their face, have uniformly been declared fraudulent in law. That the facts do not appear on their face only puts the party upon whom the burden of proving fraud is devolved to the necessity of otherwise establishing their existence, and of showing that the beneficiaries were cognizant of them. Several adjudged cases of this court show that such deeds cannot be upheld."

And in a later case a deed of trust which was made by an insolvent debtor to his partner to secure moneys advanced by the debtor's wife, and which authorized possession of the property by the grantor, and delayed the sale for three years, and instructed the trustee to wind up the business if creditors should attempt to subject the property to the payment of their debts, was adjudged void.[1]

§ 204. In Missouri it has been held that a deed conveying to a trustee a stock of goods, for the benefit of creditors, but providing that the grantor may continue to have possession, sell and dispose of the same, in the regular or usual course of his business, until default be made in the payment of some of the notes intended to be secured, is void, as matter of law.[2]

In Pennsylvania[3] and New Jersey,[4] a stipulation in an assignment, for the retention by the assignor of the possession of the property assigned, avoids the deed. And in New York, and other States, where actual and immediate delivery of possession to the assignee is essential to the validity of the transfer, such a stipulation would, of course, be fatal. And, on the whole, clauses of this character, like all those which have just been considered under the present head of reservations for the debtor's benefit, should always be avoided, as tending, at best, to give rise to questions as to their validity, and in this way to embarrass or perhaps defeat the operation and object of the whole assignment.

Id. 185. The learned judge cites Gazzam v. Poyntz, 4 Ala. 382; Hindman v. Dill, 11 Id. 689; Planters' & Merchants' Bank v. Clarke, 7 Id. 770; Wiswall v. Ticknor, 6 Id. 178; Grimshaw v. Walker, 12 Id. 102; Cummings v. McCullough, 5 Id. 324; and Rugely v. Harrison, 10 Id. 731.

[1] King v. Kenan, 38 Ala. 68; see Reynolds v. Cook, 31 Id. 634.

[2] Brooks v. Wimer, 20 Mo. 503; Stanley v. Bunce, 27 Id. 269; Reed v. Pellestier, 28 Id. 173; Billingsley's Adm'r v. Bunce, 28 Id. 547; Hatcher v. Winters, 71 Id. 80.

[3] Klapp's Assignees v. Shirk, 13 Penn. St. 579. But the mere circumstance of the property being left in the assignor's possession, after the assignment, will not, in this State, avoid it. Id. ibid. The subject of delivery of possession of the assigned property will be fully considered hereafter, under a distinct head. See Chap. XIX.

[4] Knight v. Packer, 12 N. J. Eq. 214.

§ 205. *Reservations in Mortgages and Deeds of Trust.*— Reservations and provisions beneficial to the debtor, and which would be fatal to a general assignment for the benefit of creditors, are frequently inserted and sustained in mortgages and deeds of trust in the nature of mortgages. In these instruments the debtor may reserve the possession and use of the assigned property,[1] subject to the qualifications that the sale of the property shall not be unreasonably delayed,[2] and that the property be of such a nature that it will not be consumed or lost in the use.[3] Provisions have also been sustained in such instruments by which the property vests in the assignee until the profits pay the debts, and then reverts to the assignor.[4] The distinction is to be found in these cases in the right of redemption.[5] When it exists, the contingent and residual interest of the debtor in the property still remains open to the pursuit of creditors.

§ 206. *Reservations of Surplus Moneys or Property.*— Assignments are sometimes drawn with a provision stipulating for the repayment to the assignor of the surplus moneys remaining after distribution among the creditors provided for, or for the reconveyance to him, by the assignee, of such property as may not have been converted into money. Such a stipulation is sometimes innoxious in its consequences, while, in other cases, it has the effect of invalidating the whole assignment; its validity depending upon the consideration whether or not it be a reservation of a benefit to the debtor, at his creditor's expense. Thus, a reservation to the assignor, of the surplus remaining after payment of *all* the

[1] Hempstead v. Johnson, 18 Ark. 123; Marks v. Hill, 15 Gratt. 400; Sipe v. Earman, 26 Id. 563.

[2] Hafner v. Irwin, 1 Ired. L. 496; Hardy v. Skinner, 9 Id. 191; Hempstead v. Johnson, 18 Ark. 123.

[3] Elmes v. Sutherland, 7 Ala. 267; Darwin v. Hundley, 8 Yerg. 503; Hempstead v. Johnson, 18 Ark. 123.

[4] Balt. & Ohio R. R. Co. v. Glenn, 28 Md. 287. This was a deed made in Virginia and construed under the laws of that State. Robins v. Embry, 1 Sm. & M. 207; and see Arthur v. Commercial Bank, 9 Sm. & M. 394; Fellows v. Commercial Bank, 6 Rob. (La.) 246.

[5] Hannah v. Carrington, 18 Ark. 85; Briggs v. Davis, 21 N. Y. 574.

creditors, is not fraudulent, for it is no more than the law itself would imply.[1] So, a provision in an assignment by co-partners, of all the partnership effects, for the payment of *all* the partnership debts, directing the surplus of the assigned property, if any, to be paid to the assignors, will not render the assignment fraudulent against creditors of the individual partners.[2] But where the estate assigned consists in part of the individual property of the members of the firm (as where it consists in part of real estate owned by them as tenants in common), a reservation to the assignors of the surplus remaining after payment of the partnership debts, without providing for the payment of the debts of the individual partners, will avoid the assignment.[3]

§ 207. Whether an assignment providing for only a part of the creditors, and without making provision for the rest, directing the assignee to pay back or reassign to the assignor the surplus which may remain after satisfying the debts provided for, will be sustained, has given rise to much conflict of opinion. The weight of authority is in favor of the validity of such an assignment.[4] The contrary

[1] Wintringham v. Lafoy, 7 Cow. 735; Savage, C. J., Id. 738; Story, J., in Halsey v. Whitney, 4 Mason, 206, 222; Hall v. Denison, 17 Vt. 310; Bennett, J., Id. 318; Burgin v. Burgin, 1 Ired. L. 453; Ruffin, C. J., Id. 458; Gamble, J., in Richards v. Levin, 16 Mo. 596, 598, 599; Wing, P. J., in Hollister v. Loud, 2 Mich. 309, 322; Van Rossum v. Walker, 11 Barb. S. C. 237; Ely v. Cook, 18 Id. 612; Comstock, J., in Curtis v. Leavitt, 15 N. Y. 120; Brown, J., Id. 146; Paige, J., Id. 206; see Wilkes v. Ferris, 5 Johns. 335; Finlay v. Dickerson, 29 Ill. 9; Estate of Potter v. Paige, 54 Penn. St. 465; Van Hook v. Walton, 28 Tex. 59; Farquharson v. McDonald, 2 Heisk. 404; Lininger v. Raymond, 9 Neb. 40.

[2] Bogert v. Haight, 9 Paige, 297; Walworth, C., Id. 302.

[3] Collomb v. Caldwell, 16 N. Y. 484. This case was again before the Court of Appeals (24 N. Y. 505), and it having then been shown that the real estate so conveyed was copartnership property, and so applicable in the first instance to the payment of partnership debts, it was held to have been lawfully included in the assignment to a trustee for the payment of such debts. In this case the individual property of the partners was not conveyed, and no provision was made for the payment of their individual debts.

[4] Miller v. Stetson, 32 Ala. 161; Brown v. Lyon, 17 Id. 659; Hindman v. Dill, 11 Id. 689; Conklin v. Carson, 11 Ill. 503; Finlay v. Dickerson, 29 Id. 9; The New Albany & Salem R. R. Co. v. Huff, 19 Ind. 444; McFarland v. Birdsall, 14 Id. 126; Burgin v. Burgin, 1 Ired. L. 453; Ely v. Hair, 16 B. Mon. (Ky.) 230; Bigelow v. Stringer, 40 Mo. 195; Johnson v. McAllister's Assignee, 30 Id. 327; Richards v. Levin, 16 Id. 596; Bailey v. Mills, 27 Tex. 434; Kneeland v. Cowles, 4 Chand. (Wis.) 49; Livingston v. Bell, 3 Watts, 198; Mechanics' Bank v. Gor-

rule, however, prevails in New York[1] and in some other States,[2] and in these States it has been held to make no difference whether the surplus be large or small, or whether there be any at all.[3] And even if there be no express reservation of the surplus to the assignor, it has been held, in Vermont and Michigan, that an assignment of all the debtor's property, for the benefit of a portion of his creditors, without a provision that the surplus shall be distributed among all the creditors, is fraudulent, by reason of the *resulting trust* of the surplus,[4] even (in Vermont) if it turns out that there is no surplus.[5]

§ 208. *Resulting Trust for Assignor.*—In regard to

man, 8 W. & S. 304; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; Phippen v. Durham, 8 Gratt. 457; Dance v. Seaman, 11 Id. 778; Morgan v. Bogue, 7 Neb. 429; Floyd v. Smith, 9 Ohio St. 546. In the last case cited, the cases of Hoffman v. Mackall (5 Ohio St. 134), and Dickson v. Rawson (Id. 224), are discussed and held that so far as they follow Goodrich v. Downs (6 Hill, 438), and Barney v. Griffin (2 N. Y. 365), they do not apply, under the Ohio act of 1853. The reason upon which these decisions rest, is that such a reservation results by operation of law, and is simply an incident to the trust, and not an express trust for the debtor, and that creditors are not defeated or unlawfully delayed in their remedies against the debtor in following the surplus of the estate, either in his hands or in those of his trustee. The English case of Estwick v. Caillaud (5 Term R. 420), has been much relied on for the principle that an express reservation to the debtor, where the assignment is of a portion only of his property, is not necessarily fraudulent. See the observations of Putnam, J., in Harris v. Sumner, 2 Pick. 129, 134.

[1] Goodrich v. Downs, 6 Hill, 438; Strong v. Skinner, 4 Barb. S. C. 546; Lansing v. Woodworth, 1 Sandf. Ch. 43; Barney v. Griffin, 4 Id. 552; affirmed on appeal, 2 N. Y. 365; Leitch v. Hollister, 4 Id. 211; Collomb v. Caldwell, 16 Id. 484; see Jacobs v. Remsen, 35 Barb. 384; s. c. 36 N. Y. 668.

[2] Dana v. Lull, 17 Vt. 390; Goddard v. Hapgood, 25 Id. 351; Therasson v. Hickok, 37 Id. 454; Truitt v. Caldwell, 3 Minn. 364; Banning v. Sibley, 3 Id. 389; Green v. Trieber, 3 Md. 11; Pierson v. Manning, 2 Mich. 445; Selz v. Evans, 6 Ill. App. (Bradw.) 466; Lill v. Brant, Id. 366.

[3] Barney v. Griffin, 2 N.Y. 365; Leitch v. Hollister, 4 Id. 211. But in Beck v. Burdett (1 Paige, 305), it was held that a mere hypothetical reservation of the surplus to the assignor would not vitiate the deed. And in Richards v. Levin (16 Mo. 596), Gamble, J., in delivering the opinion of the court, remarked that "where the parties have agreed that the whole amount assigned is insufficient to pay the preferred debts, the idea that the reservation of a surplus to the grantor will render the deed fraudulent, is a mere mistake." Id. 595, 599.

[4] Dana v. Lull, 17 Vt. 390; Redfield, C. J., in Merrill v. Englesby, 28 Id. 155; Pierson v. Manning, 2 Mich. 445; Pratt, J., Id. 449; Palmer v. Mason, 42 Id. 150; see Burd v. Smith, 4 Dall. 76; West v. Snodgrass, 17 Ala. 549.

[5] Dana v. Lull, *ubi supra*. But in Merrill v. Englesby, the assignment in such a case is declared to be merely defective, and such as may be remedied by a new assignment, or by a new declaration of trust in favor of all the creditors. 28 Vt. 150.

resulting trusts for the debtor, it has been held in New York, that where such a trust arises on an assignment of part of the debtor's property for the benefit of certain specified creditors, the assignment is not void, unless it were merely colorable, and made for the sake of *the resulting trust*;[1] and that where the assignment does not purport to convey all the assignor's property, and it does not appear on its face that there are other creditors not provided for, or that the value of the assigned property exceeds the amount of the preferred debts, the mere omission of the assignor to direct that any contingent surplus which may remain, after the payment of the preferred creditors, shall be applied in payment of his other creditors, will not render the assignment void on its face.[2] But if it can be shown that the assigned property exceeds in value the amount of the debts preferred, or that the assignor, at the time of the execution of the assignment, contemplated a surplus which would revert to him after the payment of the preferred debts, the assignment will be fraudulent and void.[3]

§ 209. *Reservations with Stipulations for Releases.*— A reservation of the surplus to the assignor, where it is made to depend upon certain conditions to be complied with

[1] Wilkes v. Ferris, 5 Johns. 335; Oliver Lee & Co. Bank v. Talcott, 19 N. Y. 146.

[2] In the case of Spies v. Joel, in the Superior Court (1 Duer, 669), the assignment, which was of all the debtor's property, contained no provision relative to the disposition to be made by the assignee, of any surplus that might remain after the satisfaction of the debts specified. But it was conclusively shown that the preferred debts largely exceeded in amount the whole value of the property assigned, and that this was known to the parties when the assignment was made. The court held that the omission only raised a presumption of fraud, which might be repelled, and that such presumption was in fact repelled by the evidence in the case. And where an assignment was made by a debtor, of all his property in trust to pay two creditors, and the instrument was silent as to the surplus, but it appeared that there was not enough property to pay the debts provided for, this was not regarded as an unlawful reservation to the debtor. Bishop v. Halsey, 8 Abb. Pr. 400.

[3] Doremus v. Lewis, 8 Barb. S. C. 124. In the case of Hooper v. Tuckerman (8 Sandf. S. C. 311), it was held that an assignment which transfers to a trustee, in trust for creditors, a larger amount of property than the assignee is empowered to distribute among the creditors, is void upon its face; the legal effect being to create a resulting trust to the assignor, after the trust for creditors is satisfied. Moore v. Collins, 3 Dev. 126; Beck v. Burdett, 1 Paige, 305; Hastings v. Baldwin, 17 Mass. 552; Rahn v. McElrath, 6 Watts, 151.

by the creditors, and particularly upon the condition of releasing the debtor, will also avoid the assignment. This rule may now be considered to be established by a preponderance of authority, though in some of the States it does not prevail.[1] Thus, in Pennsylvania, an assignment of property in trust for the payment of such creditors as should agree to accept the same within a specified time, and to pay the assignor the proportion of all such creditors as should not within such time signify their acceptance, was held fraudulent and void against a creditor who had obtained judgment.[2] So, in New York, where an assignment contained a proviso, that if any of the creditors named should not become parties to it within a time limited, their shares should be paid by the assignees to the assignor himself, the assignment (which contained a release of the debtor) was held fraudulent and void, and the property in the assignees' hands liable to the execution of a judgment creditor before the expiration of the time limited for creditors to execute the assignment.[3] So, where an assignment was made of part of the debtor's property, for the benefit of such creditors only as should become parties to it, containing provisions highly favorable to the assignor, and reserving to him the surplus which should remain after payment of such creditors, it was held to be coercive and void as against creditors.[4] So, in Maryland, the reservation to the grantor of the surplus that may remain after paying the assenting creditors, has been held to have the effect of avoiding the

[1] In the Virginia case of Phippen v. Durham (8 Gratt. 457), Moncure, J., remarked as follows: "If the question were *res integra*, whether a deed of trust conveying all the property of a debtor for the benefit of such of his creditors as may within a specified time release him from all further claims, and providing that the surplus of the trust fund, after satisfying the accepting creditors, should be paid to the debtor, is valid against the creditors who do not accept—I would be inclined to answer it in the negative. While the many cases on this subject are conflicting, I think the preponderance is against the validity of such deed." The case of Skipwith's Ex'r v. Cunningham (8 Leigh, 271) was, however, considered to have settled the rule the other way in that State. Id. 464. See *post*, p. 293.

[2] Burd v. Smith, 4 Dall. 76.

[3] Austin v. Bell, 20 Johns. 442.

[4] Berry v. Riley, 2 Barb. S. C. 307.

assignment.[1] So, in Alabama, an assignment of all the debtor's property, in trust, first to pay certain preferred creditors, the surplus, if any, to be appropriated to the other creditors ratably, who should, within a specified time, execute a release of their claims, and the ultimate surplus to be paid over to the assignor—was held to contain such a stipulation for the benefit of the debtor as rendered the deed fraudulent and void.[2] So, in South Carolina, a reservation to the grantor of the surplus after paying to releasing creditors forty per cent., if the estate would yield as much, was decided to be fraudulent.[3] On the other hand, in Pennsylvania[4] and Virginia,[5] a reservation to the debtor, in an assignment of all his property, of the surplus remaining after satisfying such of the creditors as should agree to release him, has been held not to invalidate the deed containing it. The same was held in Halsey v. Whitney,[6] in the case of a partial assignment. So, in Maryland, an assignment by a copartnership of all their property, in trust, first, to pay certain preferred creditors; next, to appropriate the residue to such of the creditors as should, within a specified time, assent to the deed and release the grantors; and, after full satisfaction of all the said claims and all interest out of the residue, if any, to pay all the other creditors, with a provision that if there should be any surplus it should be paid to the grantors—was held to be valid.[7] And in Alabama, an assignment appropriating the property unconditionally to the payment of certain preferred creditors, and the residue

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[1] Green v. Trieber, 3 Md. 11; Bridges v. Wood, 16 Id. 101; Barnitz v. Rice, 14 Id. 24; Rosenberg v. Moore, 11 Id. 376; Whedbee v. Stewart, 40 Id. 414.

[2] Grimshaw v. Walker, 12 Ala. 101.

[3] Jacot v. Corbet, 1 Cheves' Ch. 71.

[4] Livingston v. Bell, 3 Watts, 198; Mechanics' Bank v. Gorman, 8 W. & S. 304. But as to stipulations for a release in this State, see *ante*, pp. 252, 253.

[5] Skipwith's Ex'r v. Cunningham, 8 Leigh, 271. In Phippen v. Durham (8 Gratt. 437), this case was considered as of binding authority, though the principle of it was disapproved.

[6] 4 Mason, 206. As to this case, see *ante*, pp. 204, 267, 268.

[7] McCall v. Hinckley, 4 Gill, 128. This was decided, by an equal division of the Court of Appeals, in affirmance of the judgment of the court below.

pari passu, to all other creditors who should, within six months, execute the deed, was held not to be vitiated by the implied reservation of such residue to the grantor, in the event the latter class of creditors should fail or refuse to comply with the conditions prescribed.[1] So, in Illinois and Indiana, a clause in an assignment authorizing the payment to the assignor of the surplus that might remain after the satisfaction of the debts of such creditors as should become parties to it, does not invalidate the assignment; as creditors not parties can pursue their remedies against the debtor, following the surplus, either in his hands or those of the trustee.[2] And in Missouri, it has been held that a provision in an assignment, that the assignees should pay the surplus, if any, after paying all the debts, exclusive of cost of suits commenced or to be commenced, to the assignor, did not avoid the assignment.[3]

In Alabama, it has been held that a reservation to the grantor, in a deed of trust to pay a single preferred creditor, of the surplus after payment of the preferred debt, was not void *per se*.[4] And similar decisions have been made in North Carolina[5] and Tennessee.[6] And in New York, it has been held by the Court of Appeals, that the rule prohibiting the reservation of a surplus to the assignor does not apply to assignments made directly to creditors themselves, for the purpose of securing their particular demands.[7]

An assignment of goods for the payment of a debt due to the assignee, is not rendered fraudulent in law, by a parol agreement for the payment of the surplus to the assignor. If the value of the property assigned be out of proportion with the debt, this may be evidence of fraud in fact, which is for a jury to pass upon, and is not a subject of legal direc-

[1] Brown v. Lyon, 17 Ala. 659.

[2] Conkling v. Carson, 11 Ill. 503; Finlay v. Dickerson, 29 Ill. 9; The New Albany & Salem R. R. Co. v. Huff, 19 Ind. 444; McFarland v. Birdsall, 14 Ind. 126.

[3] Gates v. Labeaume, 19 Mo. 17; see Johnson v. McAllister, 30 Id. 327.

[4] Hindman v. Dill, 11 Ala. 689.

[5] Burgin v. Burgin, 1 Ired. L. 453.

[6] Austin v. Johnson, 7 Humph. 191.

[7] Leitch v. Hollister, 4 N. Y. 211.

tion.[1] But a secret reservation of the surplus, upon a conveyance absolute upon its face, is admitted to be a fraud.[2]

III. *Appropriation of Assets in Assignments by Firms and their Members.*

§ 210 *Preference of Individual Creditors.*—Assignments may be made by copartners of the partnership property, for the payment of the partnership debts, and by individuals, of their interest in the copartnership, for the benefit of their creditors: but assignments are also frequently made in which firm and individual property[3] is assigned for the payment of firm and individual debts, and in such cases the priorities of the different classes of creditors have given rise to some conflict of decision.

When the law marshals and distributes the individual and copartnership assets of the different members of a firm, it has respect to the several equities of the creditors of the firm and its individual members respectively. In that case, the copartnership assets are in the first place applied to the payment of the firm debts, and the individual funds of the several copartners to the payment of their respective individual debts.[4] But, remarks Chancellor Walworth, in the case of Kirby v. Schoonmaker,[5] where the copartners are administering their own funds, the copartnership creditors have no lien upon the joint funds; nor have the individual

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[1] Rahn v. McElrath, 6 Watts, 151.

[2] McCullough v. Hutchinson, 7 Watts, 434; Smith v. Lowell, 6 N. H. 67; Smith v. Smith, 11 Id. 459.

[3] Whether the conveyance is of individual as well as firm property will depend upon the intention of the parties as shown by the terms employed by them in the instrument. Thus, where the assignment was by W. A. & E. A. P. of all *their* property, this was held broad enough to include the separate property of each of the partners as well as the common property of both. Coggill v. Botsford, 29 Conn. 439; Von Wettberg v. Carson, 44 Id. 287.

[4] Mr. Justice Allen, in O'Neill v. Salmon, 25 How. Pr. 251; Parsons on Partnership, 347, 480.

A partnership made an assignment and each of the partners a separate one. It was held that the firm creditors were not entitled, after exhausting the firm assets, to resort to the individual assets until after the individual creditors' claims had been satisfied. Davis v. Howell, 33 N. J. Eq. 72 (citing many cases).

[5] 3 Barb. Ch. 49; Smith v. Howard, 21 How. Pr. 124.

creditors any lien or priority of claim upon the separate property of the debtors. Such being the case, the copartners may assign their joint property for the payment of their joint creditors, with such preferences as they may see fit. And the same principle would apply to dispositions of their individual property by the individual members of the firm. The case is entirely different, however, where copartners who are insolvent and unable to pay the debts of the firm, either out of their copartnership effects or of their individual property, have made an assignment of the property of both to pay the individual debt of one of the copartners only.[1]

This would, in effect, be a gift from the firm to the partner—a reservation for the benefit of such partner or his creditors, to the direct injury of the firm creditors.[2] Having such an effect, it has been frequently decided that such an appropriation of the assigned fund is a fraud upon copartnership creditors.[3] And in such a case, the proportion of the capital contributed by each partner is an immaterial consideration.[4]

§ 211. *Preference of Firm Creditors.*—What has been said of an assignment by copartners preferring their individ-

[1] Kirby v. Schoonmaker, 3 Barb. Ch. 51; Wilson v. Robertson, 21 N. Y. 592. A. and B., partners, gave a joint and several bond and warrant of attorney to a creditor for a firm debt; judgment was entered and execution issued; soon afterward A. and B. assigned, B. being also individually insolvent. The judgment being only partly satisfied, and A. having made an assignment, it was held that the creditor may, under A.'s assignment, share equally the personal effects of A., and is not to be subordinated to his individual creditors. Howard v. Teel, 29 N. J. Eq. 490.

[2] Wilson v. Robertson, 21 N. Y. 592; s. c. 19 How. Pr. 360; see Davis, J., in Hurlbert v. Dean, 2 Abb. Ct. App. Dec. 432.

In Stratton v. Tabb (8 Ill. App. [Bradw.] 225), it was held that a partner cannot prove a claim against the joint estate in competition with the creditors of the firm, and thereby take part of the fund, to the prejudice of those who are not only creditors of the firm but of himself.

[3] Wilson v. Robertson, *supra;* Knauth v. Bassett, 34 Barb. 31; Cox v. Platt, 32 Id. 126; s. c. 19 How. Pr. 121; Keith v. Fink, 47 Ill. 272; Heye v. Bolles, 33 How. Pr. 266; s. c. 2 Daly, 231; Kirby v. Schoonmaker, 3 Barb. Ch. 46; Lester v. Abbott, 28 How. Pr. 488; s. c. 3 Robt. 691; Schiele v. Healy, 61 How. Pr. 73; Platt v. Hunter, 11 N. Y. Weekly Dig. 300; Henderson v. Hadden, 12 Rich. Eq. (S. Ca.) 393; French v. Lovejoy, 12 N. H. 458; Thomas v. Penrich, 28 Ohio St. 55.

[4] Wilson v. Robertson, 21 N. Y. 591.

ual debts has been held to be equally true of assignments in which partnership creditors are preferred to individual creditors in the distribution of individual property.[1] This rule, however, has been doubted. Thus it has been said that neither the reason nor the rule applies to an appropriation of individual property to the payment of firm debts. Copartners are individually liable for the firm debts; the firm, however, is in no sense liable for individual debts of the partners. Individual creditors have no equitable claim upon the individual property, except to see that the firm property is primarily applied to the payment of firm debts.[2]

Hence, an application by one partner of his individual property primarily to the payment of partnership debts would be a payment by him of debts for which he was liable, and although it would create a preference yet it would not be unlawful.

In Jackson v. Cornell,[3] in the Court of Chancery for the first circuit, the subject was extensively considered, and the cases bearing upon it reviewed; and the assistant vice-chancellor held that a general assignment of his separate property, made by an insolvent copartner, which preferred the creditors of the firm, to the exclusion of his own, was fraudulent and void as to the latter. The converse of the rule was also considered as established, viz.: that an assignment by a copartnership, preferring the creditors of the individual copartners to those of the firm, was invalid against the latter, on the same principles. The decision was rested essentially

[1] Jackson v. Cornell, 1 Sandf. Ch. 348; Smith v. Howard, 20 How. Pr. 121.

[2] O'Neill v. Salmon, 34 How. Pr. 252, Allen, J.; Eyre v. Beebe, 28 Id. 333; Kirby v. Schoonmaker, 3 Barb. Ch. 46; Van Rossum v. Walker, 11 Barb. 240; Gadsden v. Carson, 9 Rich. Eq. (S. Ca.) 351; Newman v. Bagley, 15 Pick. 517. But this objection cannot be made by a partnership creditor who is preferred. Fox v. Heath, 16 Abb. Pr. 168; Scott v. Guthrie, 25 How. Pr. 512. It seems to have been assumed by Mr. Justice Robertson, in Scott v. Guthrie (25 How. Pr. 512), that such a disposition of the individual property would be void as against individual creditors, under the decisions in Collomb v. Caldwell (16 N. Y. 484) and Wilson v. Robertson (21 N. Y. 587).

[3] 1 Sandf. Ch. 348. This case is cited with approval in 3 Kent's Com. [65] 78, note b. But see Whiteley v. May, in the Virginia Circuit Court, where a contrary doctrine is strenuously maintained. U. S. Law Mag. May, 1850, p. 442; Editor's note (4) to 3 Kent's Com. (7th ed.) 78.

on the rule of equity (which was held to be uniform and stringent), that the property of a copartnership must all be applied to the partnership debts, to the exclusion of the creditors of the individual members of the firm; and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors can claim anything.[1] But in the later case of Kirby v. Schoonmaker,[2] before the chancellor, it was held that the rule relied on in the last case, applied only where a partnership was dissolved by the death of one of the copartners, or where one or both of the copartners had become bankrupt, or were discharged under the insolvent acts, so that their property was placed in the hands of the assignees appointed by *law* to make distribution; and that the rule did not go so far as to deprive the partners themselves of the power, while they have the legal control of their property, of distributing it among all their creditors, in such manner as they might see fit, provided no injustice was done to any of them. It was accordingly decided, that copartners may assign their individual property, as well as their partnership property, to pay the joint debts of the firm; thereby giving the creditors of the firm a preference in payment, out of the separate estate of the assignors, over the separate creditors.[3] It was further held that each copartner, with the assent of the others, has the corresponding right to give his individual creditors a preference in payment out of the share of the effects of the firm which, as between him and his copartners, and without reference to the debts for which they are all jointly liable, is legally his own property. And that copartners may make an assignment of their respective interests in the partnership property, to trustees, giving a preference in payment to the individual creditors of each copart-

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[1] Sandford, A. V. C., 1 Sandf. Ch. 350; citing Wilder v. Keeler, 3 Paige, 167; Egberts v. Wood, Id. 517; Payne v. Matthews, 6 Id. 19; Hutchinson v. Smith, 7 Id. 26; 1 Story's Eq. Jur. 625, § 675.

[2] 3 Barb. Ch. 46. See Newman v. Bagley, 16 Pick. 570.

[3] Van Rossum v. Walker, 11 Barb. S. C. 237, acc.

ner, out of his share of the partnership funds. But that a partner who is insolvent, and unable to pay the debts of the firm, has no right to assign his share of the partnership effects, to pay the individual debts of his copartner, for which neither he nor his property is legally or equitable liable.

The general doctrine established by the case last cited is, that there is an equity existing between the members of an insolvent copartnership, by virtue of which any of them may insist that the copartnership effects shall be applied to the payment of the debts of the firm, in preference to the payment of the private debts of the individual partners; and this gives to the creditors of the firm a *quasi* equitable lien, to be worked out through the medium of the equity of the copartners, as between themselves, and with their assent, or at least with the assent of one of them;[1] but that this equity of the members of the firm, as between themselves, does not deprive them of the right to apply the partnership effects to the payment of their joint and separate debts as they please, provided no injustice is done to any of their creditors.[2]

In the case of Nicholson v. Leavitt,[3] in the Superior Court of the city of New York, the court (Duer, J.) gave to the equitable rule of distribution in the case of insolvent copartnerships, the same application as the assistant vice-chancellor had given in Jackson v. Cornell; and in an elaborate opinion held that a preference given in an assignment of partnership property, to the creditors of one of the partners over the creditors of the firm, was invalid; and that the partnership creditors might avoid it by a suit brought for the benefit of all such creditors. It was held, however, that such preference did not render the whole assignment fraudulent or void, as decided in Jackson v. Cornell, which was considered as overruled on that point by Kirby v. Schoon-

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[1] Walworth, C., 3 Barb. Ch. 49, citing Story on Part. §§ 97, 326, 360. And see 3 Kent's Com. [65] 78.

[2] 3 Barb. Ch. 47.

[3] 4 Sandf. S. C. 252.

maker.[1] The preference violated a rule of equity, but not any statutory prohibition.[2]

The views of the court in Jackson v. Cornell, and Nicholson v. Leavitt, in regard to the applicability of the equitable rule of distribution to cases of voluntary assignments by copartners, are in accordance with those of the Court of Appeals of Virginia, in the case of McCullough v. Sommerville,[3] and of the Supreme Court of the United States, in the case of Merrill v. Neill.[4]

But an assignment of the individual property for the payment of partnership debts, reserving the surplus to the grantors, without any provision for the individual creditors where there are such, is fraudulent and void as against an individual creditor. This is illustrated by the case of Collomb v. Caldwell,[5] where partners holding certain real estate as tenants in common, assigned it with other property for the payment of the firm debts, reserving the surplus. This case was again before the Court of Appeals,[6] and it having been shown that the real estate assigned was partnership property, the assignment was sustained. It will be

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[1] 3 Barb. Ch. 46.

[2] The distinction was taken in this case between an assignment of partnership property, giving a preference to debts due from the partners individually, but containing a general trust for the partnership creditors, and such an assignment, devoting the whole property to the exclusive payment of separate debts. In the former case, the security and equal distribution of the fund would be at once attained, by holding the trust to be valid, and the preference only to be void; but in the latter, the illegality running through all its provisions, would, of necessity, vitiate the entire instrument. But in this case, the suit for setting aside the assignment must be brought in behalf of all the partnership creditors. Id. 301. See also Kemp v. Carnley, 3 Duer, 1.

In Jones v. Bartlett (50 Wis. 589), it was held that a claim for work on stock in trade of B., who afterward entered into partnership with H.,—the latter agreeing to assume half of the "debts owing the stock,"—is payable out of the assigned estate of the firm.

[3] 8 Leigh, 415.

[4] 8 How. 414. And see the case of Andress v. Miller, in the Supreme Court of Pennsylvania, 15 Penn. St. 316.

[5] 16 N. Y. 484.

[6] 24 N. Y. 505, *sub nom.* Collomb v. Read. In the case of Scott v. Guthrie, 25 How. Pr. 512, where the assignment provided for applying the property of one of the partners to the payment of the partnership debts, it was held that the assignment was not void as against partnership creditors who were preferred. But see Smith v. Howard, 20 How. Pr. 121; O'Neil v. Salmon, 25 Id. 254.

observed that this is a distinct question from that which arises where the individual property of one partner is applied to the payment of the individual debts of his copartners, for in such a case the creditors benefited have plainly no claim in law or equity upon the fund out of which payment is provided for them.[1]

In the absence of an express provision directing an unlawful appropriation of the funds, the law will interpret the instrument according to the rights of parties and the respective equities of the creditors.[2] Proof has been admitted to show that the assignment included sufficient individual property of each partner to pay his individual debts directed to be paid by the assignee.[3] Evidence may also be given to show that there are no individual debts, but the burden is on the part of those supporting the assignment, and if the proof fails, the assignment must be declared invalid.[4] But where it is apparent that such an unlawful disposition of the firm proceeds has been attempted, this will invalidate the entire instrument,[5] though in several cases this has been

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[1] Wilson v. Robertson, 21 N. Y. 587; Smith v. Howard, 20 How. Pr. 121; Morrison v. Atwell, 9 Bosw. 503; Eyre v. Beebe, 28 How. Pr. 340; O'Neil v. Salmon, 25 Id. 254.

[2] Forbes v. Scannel, 13 Cal. 242; Farquharson v. Eichelberger, 15 Md. 63; Heckman v. Messinger, 49 Penn. St. 465; Black's Appeal, 44 Id. 502; Andress v. Miller, 15 Id. 316; Eyre v. Beebe, 28 How. Pr. 340.

[3] Knauth v. Bassett, 34 Barb. 31; Van Nest v. Yoe, 1 Sandf. Ch. 4; Hollister v. Loud, 2 Mich. 309; see Smith v. Howard, 20 How. Pr. 121; Lester v. Abbott, 28 Id. 488; s. c. 3 Robt. 691.

[4] In Hurlbert v. Dean (2 Abb. Ct. App. Dec. 428; 2 Keyes, 97), the Court of Appeals held that the burden of showing the non-existence of individual debts, where an assignment of partnership property on its face provided for the payment of such debts, rested on the parties claiming under the assignment. And in the later case of Turner v. Jaycox, 40 N. Y. 470, where the assignment directed the assignee to pay the individual debts of the members of the firm out of the surplus remaining after the partnership debts should be discharged, to rebut any presumption of fraud, which might arise from the fact that it did not appear from the face of the instrument that the individual creditors were entitled to share equally in this surplus, each of the assignors testified that he owed no individual debts, and owned no individual property, and this was deemed sufficient to rebut the presumption of fraud.

[5] Wilson v. Robertson, 21 N. Y. 587; Keith v. Fink, 47 Ill. 272; Smith v. Howard, 20 How. Pr. 121. In Wilson v. Robertson, *supra*, Mr. Justice Wright remarks: "It seems very plain that the insertion of such a provision in an assignment of the partnership effects of an insolvent firm, is a violation of the statute in respect to fraudulent conveyances, and furnishes conclusive evidence of a fraudulent intent on the part of the assignors."

doubted, and the instrument has been sustained, while the illegal provision has been set aside.[1]

Where, however, one of the copartners has in good faith parted with his interest in the firm effects, and the remaining partners assign the firm property, including that in which the retiring partner was interested, for the payment of their debts, to the exclusion of the creditors of the former copartnership, no injustice is done, for the rights of the retiring partner in the property have ceased, and the equities of the firm creditors are lost.[2] Indeed, the assignment of the new firm property for the payment of the indebtedness of the former partners would be a violation of the rights of existing creditors, and an application of the property to the payment of the debts of strangers.[3]

If the executor of a deceased partner consents to the surviving partners continuing the business with the assets of the firm, his lien on property thereafter acquired will be postponed to that of creditors, when a case arises for an equitable marshaling of assets; as where the surviving partners make a general assignment for the benefit of creditors.[4]

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[1] McCullough v. Sommerville, 8 Leigh, 415; Read v. Baylis, 18 Pick. 497; Kemp v. Carnley, 3 Duer, 1; Nye v. Van Husan, 6 Mich. 329; Lassel v. Tucker, 5 Sneed, 1; Gordon v. Cannon, 18 Gratt. 387; see Eyre v. Beebe, 28 How. Pr. 383. See remarks of Hogeboom, J., in Cox v. Platt, 32 Barb. 126. In Morrison v. Atwell (9 Bosw. 503), where the assignment provided that after all partnership creditors were paid in full, the individual creditors of both partners should be paid out of the residue of the partnership fund, share and share alike, without making any provision for the application of the fund to the payment of such creditors, in accordance with the right and interest of each partner in the fund, it was held that this was good ground for an individual creditor to avoid the assignment, but was not a ground of complaint as to partnership creditors.

[2] Dimon v. Hazzard, 32 N. Y. 65; Smith v. Howard, 20 How. Pr. 121; Price v. Ford, 18 Md. 489; Miller v. Ewtell, 5 Ohio St. 508; Mandel v. Peay, 20 Ark. 325; Whitworth v. Benbow, 56 Ind. 194; Vosper v. Kramer, 31 N. J. Eq. 420; see Matison v. Demarest, 4 Robt. 161; Cox v. Platt, 32 Barb. 126; Heye v. Bolles, 2 Daly, 231; Paton v. Wright, 15 How. Pr. 481; Lester v. Pollock, 3 Robt. 691; Phelps v. McNeely, 66 Mo. 554.

[3] Lester v. Abbott, 28 How. Pr. 488; Smith v. Howard, 20 Id. 121.

[4] Hoyt v. Sprague, 103 U. S. 613.

IV. *Stipulations for the Continuance of Assignor's Business.*

§ 212. Assignments are sometimes drawn with stipulations for the continuance of the debtor's business, either by the assignees, or by the debtor himself under their direction; and where this is done as ancillary to winding up the debtor's affairs, and with the view of more effectually promoting the interests of the creditors, they will be sustained as valid.[1] But in a case in New York,[2] where the property assigned was an iron foundry, and the assignees were authorized to continue the business for the purpose of completing the manufacture of any of the assigned property, or fitting it for sale, and working up materials, etc., so as to realize the greatest possible amount of money therefrom, as in their judgment should seem most advisable; and were expressly directed to pay out of the proceeds of the property all such sums of money as they might find proper and expedient, in and about such business and manufacture, it was held that the assignment was thereby rendered absolutely void on its face, thus reversing on this point the previous decision of the Court of Errors in the important case of Cunningham v. Freeborn.[3] Mr. Justice Selden, in delivering the opinion of the Court of Appeals, makes use of the following language: "The true principle applicable to all such cases is, that a debtor who makes a voluntary assign-

[1] This has been decided in England, in Janes v. Whitbread, 20 L. J. C. P. (N. S.) 217; 5 Eng. L. & Eq. 431. But in Owen v. Body (5 Ad. & E. 28), where one of the express purposes of the trust was to carry on the trade, the deed was held to be invalid. The English forms have for a long time been drawn with clauses authorizing the trustees to carry on the business if they think fit. Nunn v. Wilsmore, 8 Term R. 521, 522; Coate v. Williams, 21 L. J. Exch. (N. S.) 176; s. c. 9 Eng. L. & Eq. 481. And, by what is called "a deed of arrangement," a debtor may make an assignment of his property to carry on his business, and to divide the profits ratably among such of his creditors as shall execute the deed, with a provision that as soon as the debts of all the creditors are satisfied, the trustees shall hold the residue of the trust property in trust for the assignor. Hickman v. Cox, 36 Eng. L. & Eq. 400. In this case, the creditors executing the deed were held to be partners *quoad* third persons.

[2] Dunham v. Waterman, 17 N. Y. 9; reversing s. c. 3 Duer, 166.

[3] 1 Edw. Ch. 256; s. c. on appeal, 11 Wend. 240. Compare Perry Ins. & Trust Co. v. Foster, 58 Ala. 502, given below.

ment for the benefit of his creditors, may direct in general terms a sale of the property and collection of the dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied, but beyond this can prescribe *no conditions whatever as to the management or disposition of the assigned property.* In all other respects the assignee must be left to act under the ordinary rules and principles, which apply to trustees in analogous cases."

Where, by an assignment, the whole of the debtor's real and personal property was conveyed to trustees upon trust, "to manage and improve, sell, &c., and convert into money all the assigned property," &c., and it appeared that the real estate was heavily encumbered with mortgages, some of which were about to be foreclosed; it was held by the Supreme Court of New York, that the power "*to manage and improve*" did not invalidate the assignment; the construction given to the clause in question being that it was not intended to embrace any act that could delay the avowed object of the assignment—"to provide for the payment of the debts."[1]

In Connecticut, an assignment of the contents of a country store, and raw materials of a factory, empowering the assignees to dispose of the property and apply the avails as directed, also to carry on the business of the factory, and to purchase such additional articles as should be necessary, until all the raw materials on hand at the time of the assignment should be worked up, was held valid.[2]

§ 213. So in Massachusetts, where, in an assignment by a manufacturing company, it was stipulated, that until default of payment of debts mentioned, the trustees should permit the assignors to remain in possession of all the property, and to sell and dispose of the personal property accord-

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[1] Hitchcock v. Cadmus, 2 Barb. 381; but was held to render the assignment void in Schlussel v. Willett, 34 Id. 615; s. c. 12 Abb. Pr. 397; 22 How. Pr. 15; and see Renton v. Kelly, 49 Barb. 536; affd. 51 N. Y. 633.

[2] De Forest v. Bacon, 2 Conn. 633; s. p. Kendall v. New England Carpet Co. 11 Id. 383.

ing to the usual course of their business, unless the trustees should be of opinion that the safety of creditors would require them to take immediate possession, in which case they should have the right to do so; and that they should also have the right to take possession of subsequently acquired property, and apply it to the payment of subsequently contracted debts; the transaction was held to be lawful.[1] And in a subsequent case in the same State, a clause in an assignment made under the statute of 1836, c. 238, empowering the assignees to work up unwrought stock, was held not to invalidate it.[2] So in Alabama, a deed of trust conveying land, slaves, mules, plantation utensils, &c., also corn, fodder and bacon, giving to the trustee the management of the plantation during the current year, and devoting the proceeds thereof to the payment of the debts to secure which the deed was made, was decided to be not fraudulent *per se*.[3] In Maryland, a clause in an assignment authorizing the

[1] Foster v. Saco Manufacturing Co. 12 Pick. 451. This was before the statute of 1836. The court in this case remark that "this assignment, as to the personal estate, was inoperative and void against any creditor who should have attached before the trustees took possession. The stipulation that the vendors should remain in possession and have the use of the property would have rendered it void as against creditors. But it was a good executory contract, and when the possession was actually taken, in pursuance of its terms, the sale became complete." Shaw, C. J., 12 Pick. 454. In the case of Bull v. Loveland (10 Pick. 9), an assignment was given in evidence, having the same feature of a stipulation that the assignor should continue the business under the direction of the assignees, who were creditors, but no question arose upon it.

[2] Woodward v. Marshall, 22 Pick. 468.

[3] Ravisies v. Alston, 5 Ala. 297; and see Planters' & Merchants' Bank of Mobile v. Clarke, 7 Id. 765.

The fact that the assignment contemplates that the planting operations of the debtors shall be continued for the current year, under their supervision, and that future advances shall be made by the creditor for their successful operation, is not inconsistent with an absolute unconditional appropriation of the property to the payment of the enumerated debts, nor is it in effect a reservation for the use of the debtor. If it appears that a stipulation for continuing the business is made, "not for the interest and benefit of the debtor, and to the prejudice of unsecured creditors, but to promote the interests of the creditors who are preferred, they (assignments) are sustained. * * * If the assignment contemplated the indefinite continuance of planting operations, it could not be sustained. But when the provision is simply for the temporary use, profitably to the creditor, of the property conveyed, until a sale can be effected judiciously, it is difficult to perceive any substantial objection to it." Perry Ins. & Trust Co. v. Foster, 58 Ala. 502; Price v. Mazange, 31 Id. 701; but see Hill v. Agnew, 12 Fed. Reptr. 230; see 21 Alb. L. J. 24.

assignee to conduct the business "for such time as in his judgment it shall be beneficial to do so," etc., was held to avoid the deed,—the certain effect of the clause being to hinder and delay creditors; and evidence that the assignor intended that the discretion vested in the assignee should be exercised for the exclusive benefit of the creditors, is inadmissible.[1]

Similar principles are applied, though the assignment provides that the power of the assignee to carry on the business shall cease whenever a majority of the creditors so desire.[2] Where stipulations of this kind are intended chiefly for the benefit of the assignor, or are coupled with provisions of an onerous or coercive character towards creditors, they will have the effect of avoiding the assignment. Thus, where there was a provision in the assignment that the assignor should be at liberty to continue his business for the term of six months, without any proceedings being taken against him, either at law or in equity; and that in case any suit or proceeding should be commenced against him, he should be at liberty to plead the assignment in discharge and acquittance thereof, such assignment was, for this and other reasons, held to be coercive and void as against creditors.[3]

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[1] Jones v. Syer, 52 Md. 211; Malcolm v. Hodges, 8 Id. 418; Price v. Pitzer, 44 Id. 521.

[2] Gardner v. Commercial Bank, 95 Ill. 298; Peters v. Light, 76 Penn. St. 289.

[3] King v. Kenan, 38 Ala. 63; and see Doyle v. Smith, 1 Cold. (Tenn.) 674; Furman v. Fisher, 4 Id. 626; Rindskoff v. Guggenheim, 8 Id. 284; Inloes v. American Ex. Bank, 11 Md. 173; Marks v. Hill, 5 Gratt. 400; Berry v. Riley, 2 Barb. S. C. 307. The assignment in this case was of a portion of the debtor's property, for the benefit of such creditors only as should become parties, and reserved to the assignor the surplus which should remain after payment of such creditors.

In Holmes v. Marshall (78 N. Ca. 262), it is held that the presumption of fraud arising from the provision that the trustor "shall have the privilege of continuing his business for one year," is not rebutted by proof that the insolvency of the trustor was unknown to the trustee and *cestui que trust* at the time of the execution of the deed.

V. *Provisions respecting the Time for executing the Trust.*

§ 214. It is sometimes the practice to stipulate in assignments, that the trust shall be executed, by sale of the assigned property and distribution of the proceeds, within a specified time. If the period fixed be a reasonable one, such a stipulation will be valid.[1] But care should be taken that it be not on the one hand too short, and, on the other, so long as to be liable to the charge of hindering or delaying creditors, which would render the assignment fraudulent and void at law.[2] Postponing to an unreasonable time the period of sale and payment will avoid the assignment; and the reasonableness of the delay depends on the character of the property and the circumstances of the case.[3] An interval of three years before the sale of real estate assigned, has been held, in Pennsylvania and Tennessee, to be unreasonably long.[4] But in North Carolina, where a deed of trust contained a stipulation that a sale should not take place for three years, and that in the meantime the grantor should remain in possession of the property, consisting of lands, negroes, &c.—it was held that the deed could not be regarded by the *court* as fraudulent in *law*, upon its face; the opposing creditor having admitted that it was not fraudulent in fact.[5] So, in Alabama, a deed of trust to secure certain creditors, which postponed a sale of the property for nearly three years from

[1] Rundlett v. Dole, 10 N. H. 458.

[2] Ruffin, C. J., in Hardy v. Skinner, 9 Ired. L. 191, 195; Phelps v. Curts, 80 Ill. 109.

[3] Hafner v. Irwin, 1 Ired. L., 490; Rundlett v. Dole, 10 N. H. 458; Hardy v. Skinner, 9 Ired L. 191; Grover v. Wakeman, 11 Wend. 187; Robins v. Embry, 1 Sm. & M. 207; Arthur v. Commercial & Railroad Bank of Vicksburg, 9 Id. 396; Farmers' Bank v. Douglas, 11 Id. 469; Henderson v. Downing, 24 Miss. 106; Mitchell v. Beal, 8 Yerg. 134; Bennett v. Union Bank, 5 Humph. 612; Hempstead v. Johnson, 18 Ark. 123; Knight v. Packer, 12 N. J. Eq. 214; Perry Ins. & Trust Co. v. Foster, 58 Ala. 502.

[4] Adlum v. Yard, 1 Rawle, 163; Mitchell v. Beal, 8 Yerg. 134; Young v. Hail, 6 Lea (Tenn.), 175, where the delay was four years and six months.

[5] Hardy v. Skinner, 9 Ired. L. 191. Chief Justice Ruffin, who delivered the opinion of the court, admitted this to be "a singular and extremely suspicious transaction," and spoke of the provision as "a very extraordinary one," which might justify a jury in finding it to be fraudulent in fact; but said that the creditor, by admitting that there was no fraud in fact, had given up the case.

the date of the deed, providing also that the grantor should in the meantime retain possession of the property, but devoted all the property as well as the profits to the payment of the debts, was sustained by the court.[1] And in Virginia, a deed of trust conveying land, slaves, crops, &c., and which was not to be enforced till the end of two years from its date, the profits being, in the meantime, reserved to the grantor, was held to be not fraudulent as to creditors.[2] A year's suspension of proceedings, where the expressed object of the conveyance was to prevent a sacrifice of the property, was decided in Kentucky to be fraudulent.[3] But twelve months to collect the debts and sell the property of an insolvent company was considered, in Mississippi, not unreasonable; the debts being numerous and widely scattered, and the creditors residing at a distance.[4] The same period has been adopted in Pennsylvania, as the proper limit beyond which a delay will not be allowed. Thus, where an assignment contained a provision allowing the assignees to delay payment of the creditors provided for, for more than a year from the date of the assignment, it was held to render it absolutely void as to non-assenting creditors.[5] But in a later case, it was decided that a proviso, in an assignment, that the trust should be closed within two years, and, if not then closed, that the assignees should, within six months, sell remaining assets sufficient to pay the debts preferred, but stipulating also for payment and distribution among the preferred creditors, from time to time, as often as there should be moneys in hand, did not postpone the liability of the assignees to account, or protect them from being cited after a year, and was therefore no objection to the validity of the

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[1] Elmes v. Sutherland, 7 Ala. 262; commented on and approved in Johnson v. Thweatt, 18 Id. 741, 746.

[2] Dance v. Seaman, 11 Gratt. 778; and see Cochran v. Paris, Id. 348; Lewis v. Caperton's Ex'r, 8 Id. 148.

[3] Ward v. Trotter, 3 Monr. (Ky.) 1.

[4] Robins v. Embry, 1 S. & M. Ch. 207.

[5] Sheerer v. Lautzerheizer, 6 Watts, 543.

assignment.[1] In Kentucky, three months delay of payment, for the purpose of maturing a crop and fattening stock, was held to be not unreasonable.[2] And in Alabama, a provision in the deed delaying a sale for two months, was held not to invalidate it.[3] In Arkansas, it is provided by statute, that the assignee must sell within one hundred and twenty days after the execution of his bond, and must give thirty days notice of the time and place of sale.[4]

§ 215. In the Mississippi case of The Farmer's Bank of Virginia v. Douglas,[5] it was said to be "difficult, indeed impossible, to lay down any precise and definite rule, applicable in all cases. In general, no further indulgence should be granted than the usual time of collecting debts by due course of law.[6] Yet there may, perhaps, be circumstances in which it would not be fraudulent to stipulate for greater delay; as where the debts are very large, the property likewise large, and where the personal exertions of the debtor are also relied on as one means of payment."[7] In the later case of Henderson v. Downing,[8] in the same State, the rule was laid down in more absolute terms, the court (Yerger, J.) disclaiming the exception suggested in the preceding case, as not justified by good policy or a fair construction of the statute of frauds. In this case, the deed of trust contained a stipulation extending the time of payment for five years;

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[1] Dana v. Bank of the United States, 5 W. & S. 223. A deed of land to a trustee, containing power to sell in two years to pay a specified creditor, "and if any balance remain, then to pay over the same to the grantor," is valid against *subsequent* creditors. And if the power is not executed within two years, the trust remains good, and the land cannot be sold by subsequent creditors of the grantor. Phillips v. Zerbe Run, &c. Co. 25 Penn. St. 56.

[2] Christopher v. Covington, 2 B. Mon. 357; see Perry Ins. & Trust Co. v. Foster, 58 Ala. 502.

[3] Hindman v. Dill, 11 Ala. 689; and see further, subd. VI, *post*, in this chapter.

[4] R. S. of Ark. (1874), § 387, p. 208.

[5] 11 S. & M. 469; Clayton, J., Id. 539.

[6] Mitchell v. Beal, 8 Yerg. 134; 3 Humph. 180.

[7] Bennett v. The Union Bank of Tennessee, 5 Humph. 612.

[8] 24 Miss. 106, 116.

and this was held to render it fraudulent and void as to existing creditors.

§ 216. An omission to limit any time for the assignee to apply the proceeds of the assigned property, has been held, in Massachusetts, to be not objectionable; because the law in such cases requires it to be done in a reasonable time.[1] In the New York case of Cunningham v. Freeborn,[2] there was no limitation of time within which the trust was to be executed. But this was not considered objectionable, especially where, from the nature of the business, it was impossible to fix a time. "All convenient dispatch," observed Mr. Justice Nelson, in that case, "was the best limit; and it put the execution of the trust under the control of a court of equity, and with it the conduct and fidelity of the trustee."[3] But in another case in New York, where an assignment provided that, after paying the preferred debts, the assignees should distribute the funds realized from the assigned estate among the general creditors, "at such reasonable time or times as they in their discretion might think proper," it was held to be, on that ground, void.[4]

In Michigan, however, an assignment containing a similar provision, has been held to be unobjectionable, on the ground that no time was limited by it for closing the trust.[5]

A provision that the assignee may, in his discretion, pay creditors in installments, or retain the money until all the assets are collected and then close up the estate at once, will not avoid the assignment, though any improper delay would render the assignee liable in damages, or subject him to removal.[6]

But where the provisions of the assignment itself have the effect of postponing indefinitely the time for closing the

[1] Stevens v. Bell, 6 Mass. 339; and see Hower v. Geesaman, 17 S. & R. 251; New Albany & Salem R. R. Co. v. Huff, 19 Ind. 444; Wilt v. Franklin, 1 Binn. 502.

[2] 11 Wend. 241. [3] Id. 255, 256.

[4] D'Ivernois v. Leavitt, 23 Barb. 63; see p. 307, *ante*; but see Townsend v. Stearns, 32 N. Y. 209; *post*, p. 316.

[5] Hollister v. Loud, 2 Mich. 309, 321. [6] Eicks v. Copeland, 53 Tex. 581.

trust and making distribution, the delay, unless assented to by the creditors, will be considered fraudulent. A conveyance by a debtor in failing circumstances, of all his property to trustees, in trust, to retain it for an indefinite time, until, after defraying the expenses of the trust, they have, out of the profits, paid all the debts of the grantor, where the property thus conveyed is to revert or be reconveyed to him, is fraudulent and void, as hindering and delaying creditors.[1] Where, therefore, an incorporated railroad and banking company, being in failing circumstances, and by its charter owning in fee simple the site of the railroad and other buildings and lots attached to it, assigned by deed all of its real and personal estate to assignees, to pay therewith, and out of the profits of the railroad when completed, it being then unfinished, a certain debt to be contracted by the assignees for the completion of the road, and all the expenses of the trust and of the corporation, and then the debts of the corporation; and no provision whatever was made for the sale of the fee simple of the corporation in the site of the road, &c.; and the assignment of the profits of the road was indefinite in its duration, except that it was to last until the debts were paid, when the fee, with the road, was to revert to the corporation—it was held that the tendency of the assignment was to lock up the estate indefinitely, to create a perpetuity, to hinder and delay creditors unreasonably, and to secure an ultimate and permanent advantage to the corporation; and that it was therefor void.[2]

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[1] Arthur v. The Commercial & Railroad Bank of Vicksburg, 9 Sm. & M. 394.

[2] Id. ibid. The doctrine of this case was confirmed by the Supreme Court of Louisiana, in Fellows v. The Commercial & R. R. Bank of Vicksburg (6 Rob. 246); and by the Supreme Court of the United States, in Bodley v. Goodrich (7 How. 276). The decision in the last case went chiefly on the ground that the creditors had not assented to the assignment. The same deed of assignment had been previously held good by the Court of Chancery of Mississippi, in Robins v. Embry, 1 Sm. & M. Ch. 207.

VI. *Limitation of Time for Creditors to become Parties, or Assent.*

§ 217. Assignments are sometimes drawn with a provision requiring the creditors for whose benefit they are made to become parties to them, or to assent to them, within a limited time. Where this is the case, the time so limited must be a reasonable one.[1] What is to be deemed a reasonable time, is matter dependent upon the particular circumstances of each case, the situation of the creditors, &c. A time may be so short, or so long, as justly to raise a presumption of fraud.[2] It must neither be too long, so as thereby to improperly delay the creditors in the collection of their debts, nor so short as not to afford time for examination, and therefore be merely illusory.[3] In Pennsylvania, in the case of Burd v. Smith,[4] the creditors were required to accept the assignment within nine months. The deed not having been delivered to the assignees for about two months after its date, the court held this to be too short a time, under the circumstances, for the whole of the creditors to receive notice of the deed, and signify their assent within the limited time. In Massachusetts, in the case of Halsey v. Whitney,[5] six months were allowed for the creditors to come in under the assignment; and this was held to be not too long, considering the state of the affairs of the debtor. In the case of Dedham Bank v. Richards,[6] in the same State, two calendar months were limited by the assignment, for creditors to become parties, with a proviso for extending it, not to exceed in the whole six calendar months; to which no objection was taken. In Virginia, in the case of Phippen v. Durham,[7] in which the assignment was sustained, the creditors were required to signify their acceptance within thirty

[1] Green v. Trieber, 8 Md. 11.

[2] Story, J., in Halsey v. Whitney, 4 Mason, 206, 225; see Pearpoint v. Graham, 4 Wash. C. C. 232; Fox v. Adams, 5 Greenl. 245.

[3] Ashurst v. Martin, 9 Port. 566.

[4] 4 Dall. 76.

[5] 4 Mason, 206.

[6] 2 Metc. 105.

[7] 8 Gratt. 457.

days. In Alabama, the case of Ashurst v. Martin,[1] one hundred and fifty days after notice of the deed was held a reasonable time, the creditors being scattered over a large space. In Brown v. Lyon,[2] in the same State, the assignment required the residuary creditors to execute it within six months. In Illinois, in the case of Howell v. Edgar,[3] an assignment requiring all creditors wishing to become parties to it to affix their signatures thereto within twelve months from its date, it being stipulated that the debtor should not be held liable to pay any creditors who might sign the same any deficiency that should remain unsatisfied of their respective demands, was held to be fraudulent and void. So in a late case in the same State, where the deed of assignment relieved preferred and resident creditors from the necessity of any acceptance, but excluded from the benefit of the assignment all other creditors, some of them residing at great distances, who should not signify their acceptance within a fixed time, which under the circumstances was unreasonably short, the assignment was held void.[4] In Tennessee, a provision in a deed of assignment requiring the creditors to present their claims within a specified time—twenty months—was not thought objectionable.[5] A provision requiring creditors to prove their claims before receiving a dividend is no evidence of an intent to hinder or delay them.[6] In Maine, creditors are allowed, by statute, three months from the execution of the assignment, to become parties.[7] In Oregon,[8] if a claim is not presented within three months the creditor is postponed until after the payment in full of all claims presented and allowed within that time. In New Hampshire,[9] the assent of creditors to an assignment, executed pursuant to the statute, will be presumed, unless their dissent is made

[1] 9 Port. 566.
[2] 3 Scam. 417.
[3] 17 Ala. 659.
[4] Hardin v. Osborne, 60 Ill. 93.
[5] Meyer v. Pulliam, 2 Head (Tenn.), 346.
[6] U. S. Bank v. Hutte, 4 B. Mon. (Ky.) 423.
[7] Rev. Stat. (ed. 1871), p. 543, § 4.
[8] Gen. Stat. (ed. 1878), c. 140, § 3.
[9] Laws of 1878, p. 36.

known to the assignee, within thirty days after public notice given of the assignment; and in some of the States, provision is made by statute, regulating the time within which creditors may come in and present their claims.[1] If no time be prescribed within which the conditions of the assignment are to be complied with, where it contains or stipulates for a release of the debtor, or if the time named be unreasonable, it seems that the deed will be considered fraudulent.[2]

VII. *Provisions Respecting the Sale of the Property Assigned.*

§ 218. *Time of Sale.*—We have already seen that a clause unreasonably postponing the time of sale of the assigned property will avoid the assignment. If the assignee be directed to delay the sale, for the purpose of obtaining higher prices for the property, unless by the consent of the creditors, it will be considered a fraud upon them.[3] So, if the sale be made conditional upon a certain event. Thus, in a case in Michigan, where the assignment contained a clause that the real estate conveyed by it should not be sold by the assignees until all the personal property and assets assigned should be exhausted, unless with the consent of the

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[1] See *post*, Chap. XLII.

[2] Pearpoint v. Graham, 4 Wash. C. C. 232; 2 Kent's Com. [533] 693; Green v. Trieber, 3 Md. 11; Henderson v. Bliss, 8 Ind. 100, 104. In Shackelford v. P. & M. Bank of Mobile (23 Ala. 238), it was held that when the deed conveys all the grantor's property of every description, and places all his creditors on an equality, the failure to provide any mode of giving notice to the creditor, or to make them parties to the deed, is not sufficient to render it void upon its face.

[3] Hart v. Crane, 7 Paige, 37; Phelps v. Curts, 80 Ill. 109. Where a clause in a deed of assignment directed the sale of the assigned property "when convenient and as soon as it can be done without material sacrifice," it did not operate to render the assignment invalid. Wooster v. Stanfield, 11 Iowa, 128.

A provision allowing the assignee "to retain the property to await a rise in price, or a more favorable market, as they may think most advisable," avoids the assignment. Maughlin v. Tyler, 47 Md. 545. In Maennel v. Murdock (13 Id. 164), the assignees were authorized to sell "whenever they shall think proper and most conducive to the interest of the trust," and this was held not unreasonable. In Maughlin v. Tyler, the court says: "But a general sound discretion like this to be exercised in the interest of the trust, and in the exercise of which the discretion of a court of equity may be invoked, is a very different thing from an express power to retain property to await a specified event, which can only occur at some indefinite future period."

assignor, it was held to be not an unconditional assignment, and therefore fraudulent and void in law as against creditors not preferred, or not provided for in the assignment.[1] So, where the deed of assignment provided that the real estate assigned should be sold at private sale, at the most favorable opportunity which should occur within two years, of which the assignee was to be the sole judge, and if the property could not be sold at private sale within two years, without great loss, then, at the expiration of that period, it should be sold absolutely at public sale, it was adjudged that the necessary effect of this clause was to hinder, delay and defraud creditors, and that it rendered the assignment void.[2] But in some cases, directions for delaying a sale until the happening of a certain contingency or event, have never been held valid. Thus, where a deed conveying all the estate of a debtor, in trust to pay debts and secure sureties and indorsers, provided that the estate should not be sold until the estates of the sureties and indorsers were levied on, upon judgments obtained against them; it was held in Alabama, that the deed was not objectionable as being made "to hinder, delay, or defraud creditors."[3] So, an assignment of a similar character was held, in the same State, not to be void on account of a condition that there should be no sale until the security debt was first paid.[4]

§ 219. The assignee has a discretion as to the time of sale, but it is a legal discretion, subject to the control of a court of equity,[5] and directions which simply in terms confer such a discretion, and which are entirely in harmony with the duty of the assignee as trustee, are harmless. Thus, a direction to convert the property into cash "as soon as the same may conveniently and properly be done,"[6] "to sell the same

[1] Pierson v. Manning, 2 Mich. 445, 448, 449.
[2] Hardin v. Osborne, 60 Ill. 98.
[3] Planters' & Merchants' Bank v. Clarke, 7 Ala. 765.
[4] Tarver v. Roffe, Id. 873.
[5] Thornton, J., in Hardin v. Osborne, 60 Ill. 98.
[6] Ogden v. Peters, 21 N. Y. 23, Comstock, J.

without delay,"[1] "to sell, dispose of, and convey the said real estate and personal property, at such time or times, and in such manner as shall be most conducive to the interests of the creditors, and convert the same into money as soon as may be consistent with the interests of said creditors,"[2] and such like,[3] have been ordinarily inserted in assignments, and although sometimes questioned, as tending unduly to extend the powers of the assignee to the prejudice of creditors, have been generally sustained.

And even where the time of sale has been left to the option of the trustees or creditors, it has been held not to affect the validity of the assignment. Thus, in Alabama, a provision that the assigned property might remain in the trustee's possession until he might choose to sell, or be required to do so by the beneficiaries of the deed, was held to afford no inference of fraud.[4] And in the same State, an assignment by the members of a mercantile company, conveying land for the payment of the debts of the partnership, and requiring the trustee to sell at the instance of any creditor of the firm, was held to be founded on sufficient consideration.[5] And in

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[1] Griffin v. Marquardt, 21 N. Y. 121.

[2] Jessups v. Hulse, 21 N. Y. 384; and see remarks of Selden, J., in this case. In Brigham v. Tillinghast (15 Barb. 618), the assignment directed the assignees to sell "as soon as practicable and expedient for the best interests of all concerned." In Bellows v. Partridge (19 Barb. 176), the direction was to sell "as soon as reasonably practicable, with due regard to the rightful interests of the parties concerned." In Hollister v. Loud (2 Mich. 309, 321), the direction was to sell "within such reasonable time as to them shall seem meet." In Mussey v. Noyes (26 Vt. 462), the direction was to sell "as soon as practicable and in the most beneficial manner."

[3] In Townsend v. Stearns (32 N. Y. 209), the direction was "to sell and dispose of the assigned premises, at such time or times, and in such manner, as to him (the assignee) may seem to be most for the benefit and advantage of the creditors." In all these cases, the clauses in question were held to be unobjectionable. And see Wilson v. Robertson, 21 N. Y. 587; Benedict v. Huntington, 32 N. Y. 219; Meeker v. Saunders, 6 Iowa, 61. And see observations of Duer, J., in Nicholson v. Leavitt, 4 Sandf. S. C. 252, 297. But in Woodburn v. Mosher (9 Barb. 255), where the assignment directed the assignees to sell "within convenient time as to them shall seem meet," it was held that this clause authorized the assignees to discharge their duties whenever it should suit their convenience, and that it rendered the assignment void, as operating to hinder or delay creditors. Monson, J., Id. 257. And see the general rule laid down in Brigham v. Tillinghast, 13 N. Y. 220.

[4] Dubose v. Dubose, 7 Ala. 235.

[5] Griffin v. Doe, 12 Ala. 783.

a later case, in the same State, it has been held that a deed of trust conveying property absolutely to the trustee, for the payment of certain specified debts of the grantor, imposing no condition prejudicial to the creditors, or restrictive of their rights, and stipulating for no benefit to the grantor, is not fraudulent on its face, although it gives the trustee a discretion as to the time and manner of selling the property conveyed by it. Such a power, it was said, does not affect the *bona fides* of the transaction, or tend to delay the creditors in the collection of the debts secured. Were the trustee to refuse to act promptly, or within a reasonable time, they might compel him, in equity, to do so, or have him displaced and one appointed who would faithfully execute the trust created by the deed.[1] Even the reservation to the debtor himself, of the power of fixing the time of sale, has, under certain circumstances, been permitted. Thus, in North Carolina, where a deed of trust to secure certain creditors, prescribed a time after which the property should be sold, but reserved to the debtor the power of ordering a sale at an earlier day, it was held that such a provision did not, *per se*, make the deed fraudulent in law against other creditors.[2] And in a later case, in the same State, it has been held that a provision in a deed of trust, for the postponement of the sale of the property for nine months, and then to be sold on a credit for six months, is not a fraud in law, so as to require the court to declare it void on its face.[3] And in Virginia, where a deed of trust provided that the property assigned should not be sold for two years, unless with the consent of the debtor, and that after that time the trustee should sell the property on a credit, as to the land, of one and two years, it was held that the deed was not fraudulent *per se*.[4]

[1] Evans v. Lamar, 21 Ala. 333; Ligon, J., Id. 336. The deed, in this case, empowered the trustee to sell, "either at private or public sale, as he might deem best, and at such times as he might deem proper, either for cash or on credit." Id. 334; see Perry Ins. Co. v. Foster, 58 Ala. 502,

[2] Cannon v. Peebles, 2 Ired. L. 449; s. c. 4 Id. 204.

[3] Gilmer v. Earnhardt, 1 Jones' L. 559.

[4] Dance v. Seaman, 11 Gratt. 778; see, however, the observations of Allen, P.,

In the forms of general assignments now in use, it has been the practice not to fix or limit a particular time for the sale of the assigned property, but to leave it to the discretion of the assignees, in general terms; they being only directed to sell "with all reasonable speed;" or "as soon as reasonably practicable;" or "from time to time, and at such time as they may deem reasonable and proper;" or the like.[1]

§ 220. *Mode of Sale.*—It has been a common practice in drawing voluntary assignments, to leave the *manner*, as well as *time* of sale, to the discretion of the assignees; authorizing them to sell "at public or private sale," as they may deem proper;[2] they having such a discretion, in the absence of any express direction or authority contained in the instrument.[3] In some cases, objections have been raised against assignments on this ground. But, in Alabama, a discretion of this kind, given to the trustee in a deed of trust, has re-

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Id. 780. With regard to the length of time for which the sale may be delayed, it has been held that forty days (Hafner v. Irwin, 1 Ired. L. 490), three months (Christopher v. Covington, 2 B. Mon. [Ky.] 357), four months (Cannon v. Peebles, 2 Ired. L. 449; s. c. 4 Id. 204), nine months (Gilmer v. Earnhardt, 1 Jones' L [N. Ca.] 559), eleven months (Young v. Booe, 11 Ired. L. 347), have been considered good; but one year (Sheerer v. Lautzerheizer, 6 Watts, 543; *contra*, Graham v. Lockhart, 8 Ala. 9; Farquharson v. McDonald, 2 Heisk. 404; Rindskoff v. Guggenheim, 3 Cold. [Tenn.] 284), eighteen months (Barcroft v. Snodgrass, 1 Id. 430), two years (Quarles v. Kerr, 14 Gratt. 48), three years (Adlum v. Yard, 1 Rawle, 103), and five years (Storm v. Davenport, 1 Sandf. Ch. 135), have been held fatal. Bump on Fraud. Con. 412, 413.

[1] See form in Illinois, Sackett v. Mansfield, 26 Ill. 21; in Ohio, Thomas v. Talmadge, 228; Abbott's Conveyancer.

[2] Sackett v. Mansfield, 26 Ill. 21; Halstead v. Gordon, 34 Barb. 422. In Work v. Ellis, 50 Barb. 512, a restriction, requiring the assignee to sell at public sale, was looked upon as a strange provision, and tending to confirm the idea that the assignment was made to coerce creditors into a settlement. In Farquharson v. Eichelberger (15 Md. 63), it was said to be no valid objection to an assignment that it provides that the assignee may sell at private sale. And see observations of Duer, J., in Nicholson v. Leavitt, 4 Sandf. S. C. 252; rev'd, 6 N. Y. 510; North River Bank v. Schumann, Daily Reg. Aug. 30, 1882. The modern English forms are drawn with a similar clause. See James v. Whitbread, 20 L. J. C. P. (N. S.) 217; 5 Eng. L. & Eq. 431.

[3] Hart v. Crane, 7 Paige, 37. In Waldron v. Wilcox (R. I., Index P, 128), provisions allowing the assignee to sell at public or private sale, to buy in the premises and re-sell without responsibility for loss, did not invalidate the assignment as against creditors, it not appearing that any benefit accrued to the assignor at their expense from the powers given.

peatedly been held to be not indicative of fraud.[1] And in North Carolina, a provision authorizing a trustee to sell at private sale, was held, at most, to be only evidence of fraud to be left to a jury; and was no ground for the court to pronounce the deed fraudulent *per se*.[2] In Arkansas, a sale by the assignee must be at public auction, and, as before stated, within one hundred and twenty days after the execution of the assignee's bond;[3] and a provision in the assignment contrary to these requirements renders it void.[4]

The discretion given to the assignees, on this point, is sometimes expressed in more general terms; the assignment empowering them to sell "in such manner as they may consider expedient, and most for the interest of all parties."[5] And sometimes both modes of sale are designated; the assignees being authorized to sell in such manner as they may think most advisable, within a limited time (as one year), and then to close the sale at auction.[6]

§ 221. *Terms of Sale—Power to Sell on Credit.*—It has also been a common practice in drawing assignments, to leave the *terms*, as well as the time and mode of sale, to the discretion of the assignees; authorizing them to sell "upon such terms as they shall think most expedient or advantageous;"[7] and sometimes more particularly empowering them to sell "for cash or upon credit,"[8] as they may deem

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[1] Brock v. Headen, 13 Ala. 370; Abercrombie v. Bradford, 16 Id. 560; Evans v. Lamar, 21 Id. 383; Shackelford v. P. & M. Bank of Mobile, 22 Id. 238.

[2] Burgin v. Burgin, 1 Ired. L. 453. It was observed by Ruffin, C. J., in this case, that a higher price may sometimes be got by private contract than by auction. Id. 458. In point of fact, a *public* sale appears to have been intended by the assignment in this case, the word "private" being inserted by the misprision of the writer. Id. 454, 458.

[3] R. S. of Ark. (1874), § 387, p. 208.

[4] Bartlett v. Teah, 1 McCrary, 176; Raleigh v. Griffith, 37 Ark. 150.

[5] Neally v. Ambrose, 21 Pick. 185. In this case, it was held that under such an assignment, the assignee might sell on a credit. Farquharson v. Eichelberger, 15 Md. 63; Ely v. Hair, 16 B. Mon. 230. But see Clark v. Fuller, 21 Barb. 128, *contra*.

[6] Hopkins v. Ray, 1 Metc. 79.

[7] Ashurst v. Martin, 9 Port. 566; Pierce v. Brewster, 32 Ill. 268.

[8] When the instrument is silent, the assignee will have the power of sale for cash or on credit, in his discretion as trustee. Hoffman v. Mackall, 5 Ohio St. 124.

proper, or most for the advantage of parties.[1] In regard to the power to sell *on credit*, it was formerly held in New York, that a clause expressly giving such a power did not vitiate the assignment on the ground of hindering and delaying creditors;[2] that the power itself was, in many instances, beneficial to the interests of creditors, and, in some cases, essential to the due execution of the trust;[3] and that where it was not expressly given, it was usually implied in trusts for the payment of debts.[4] But the Court of Appeals of this State have, in several cases, determined that a clause of this kind avoids the whole assignment;[5] its tendency and effect being to "hinder, delay, and

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[1] The forms now in use in England, allow the trustees to give any credit, and take any security for the purchase-money. See Janes v. Whitbread, 5 Eng. L. & Eq. 481.

[2] Rogers v. De Forest, 7 Paige, 272; Nicholson v. Leavitt, 4 Sandf. S. C. 252; reversed on appeal, 6 N. Y. 510.

[3] Nicholson v. Leavitt, 4 Sandf. S. C. 252; Duer, J., Id. 289, 290.

[4] Walworth, C., in Rogers v. De Forest, 7 Paige, 272; Nicholson v. Leavitt, *ubi sup.*

[5] Barney v. Griffin, 2 N. Y. 365, 371; Nicholson v. Leavitt, 6 N. Y. 510; Burdick v. Post, Id. 522; Porter v. Williams, 5 Id. 142; Kellogg v. Slauson, 11 Id. 302; Brigham v. Tillinghast, 3 Id. 215.

The question having been thus repeatedly passed upon by the court of last resort, is to be considered in this State as judicially settled. But as the contrary has also been held in able and well-reasoned opinions, a brief view of the course of the decisions, with the grounds of each, may not be without value or interest to the profession in other States.

The first case in which the question appears to have arisen, was that of Rogers v. De Forest, which came before the Court of Chancery in 1838 (7 Paige, 272). In this case, the assignment, which was of both real and personal property, contained an express power to the assignee, to sell on credit, and also to lease and mortgage the assigned estate for the benefit of creditors. The chancellor held that the power to *sell on credit* did not render the trust invalid under the provisions of the Revised Statutes, relative to uses and trusts; neither did it render the assignment fraudulent and void, as against the creditors of the assignor. "The express power to sell on credit," he observed, "is a power which is usually implied in trusts of this description, and it is not a violation of the provisions of the Revised Statutes, relative to uses and trusts. Neither does the creation of such a trust tend, in any manner, to delay or hinder the creditors of the assignor in the collection of their debts. For if the assignees do their duty, they will not sell the property on credit, without obtaining therefor the difference in value between a sale for cash and a sale upon credit. And the creditors, should they think proper to do so, have a right to insist that such securities should be immediately converted into money, and applied towards the satisfaction of their respective debts, or as soon as they shall deem it for their interest to have it done." But as to the power or trust in the assignment, *to lease or mortgage*, the chancellor held that such a trust was not authorized by the Revised Statutes, and that, for that reason, no estate in the real property vested in the assignees.

On an appeal from the decree in this case, to the Court of Errors (Darling v.

defraud creditors," within the meaning of the statute. The

Rogers, 22 Wend. 483), the chancellor's decision was reversed; the court holding the assignment to be so far valid as to vest the estate in the real property in the assignee. But the question as to the validity of the power to *sell* on *credit*, was not brought before the court, nor was it noticed in the opinion delivered on the appeal. The chancellor's decision, therefore, sustaining the assignment on that point, may be considered to have been left undisturbed.

In the case of Meacham v. Sternes, which came before the Court of Chancery in 1842 (9 Paige, 398), the assignee was directed by the assignment to sell the trust property at such reasonable times as should seem proper to him; and it was held that this did not authorize him to sell *at retail and on credit*, nor to send to agents to sell on commission. The chancellor, in the course of delivering his opinion, observed that it was a breach of duty in the assignee to *retail* the property upon *credit*. "For the creditors were entitled to have the assigned property converted into money and applied to the payment of their debts, without any unnecessary delay. And the assignment itself would have been clearly fraudulent, if the assignors had, in terms, directed their assignees to dispose of the property in the manner in which it was disposed of by the trustee in this case; they being at the time of the assignment in failing circumstances, and making this assignment of all their partnership effects in trust to pay their debts."

In the case of Barney v. Griffin, which came before the vice-chancellor of the first circuit, in 1847 (4 Sandf. Ch. 552), the assignment authorized the assignees to sell the real estate assigned, at public or private sale, for cash or upon credit, or partly for cash and partly upon credit, and generally upon such terms as the assignees should think most advantageous. But it also contained other and highly obnoxious clauses, especially a reservation to the assignor of the residue of the assigned property remaining after payment of certain specified creditors, to the exclusion of the general creditors; upon which the vice-chancellor's decision declaring it void seems to have been essentially based; the only authority cited and relied on by the court being that of Goodrich v. Downs, in the Supreme Court (6 Hill, 438), in which such a clause was the principal ground of the decision. On an appeal to the chancellor, the vice-chancellor's order, appointing a receiver, was affirmed; and the case was then carried to the Court of Appeals.

In Barney v. Griffin, as it came before the Court of Appeals, in 1849 (2 N. Y. 365), the principal grounds of objection to the assignment were two, namely, the clause reserving the residue, as above stated, to the assignor, and the clause authorizing a sale of the assigned property on credit. On the first point, the opinion of the court was unanimous against the validity of the assignment; the point having been in fact already conclusively settled. And on the second point, it was held by Bronson, J., who delivered the opinion of the court, to be an unanswerable objection to the deed, that the assignees were authorized to sell the property on credit. "An insolvent debtor," he observed, "cannot, under color of providing for creditors, place his property beyond their reach, in the hands of trustees of his own selection, and take away the right of the creditors to have the property converted into money for their benefit, without delay. They have the right to determine for themselves, whether the property shall be sold on credit; and a conveyance which takes away that right, and places it in the hands of the debtor, or in trustees of his own selection, comes within the very words of the statute: it is a conveyance to hinder and delay creditors, and cannot stand." Id. 371. The learned judge relied on the case of Meacham v. Sternes, observing that the question was considered by the chancellor in that case, and that his views fully accorded with his own. The case of Rogers v. De Forest was not noticed.

In Nicholson v. Leavitt, a very important case, involving the validity of several voluntary assignments, came before the Superior Court of the city of New York, in 1850 (4 Sandf. S. C. 252). Some of the assignments contained a clause directing a sale of the assigned property "for cash or upon credit, or partly for cash and partly upon credit, and by and under such terms and conditions as the as-

same doctrine has been recognized by the Supreme Courts

signees should deem reasonable and proper;" and upon this and several other grounds, the assignments were assailed as invalid. The case was fully considered by Duer, J., in a long and elaborate opinion; and the court, through him, held that a discretionary power given to the assignee in an assignment for the benefit of creditors to sell the assigned property on credit, was not evidence of an intent to defraud creditors, and did not vitiate the assignment. The court adopted the opinion, and followed the ruling of the chancellor in the case of Rogers v. De Forest, which was considered to have not been disturbed either by the judgment of the Court of Errors in Darling v. Rogers, or by the chancellor's own remarks in Meacham v. Sternes. The decision of the Court of Appeals to the contrary, in Barney v. Griffin, was not considered as of binding authority; the opinion expressed by Mr. Justice Bronson in that case, on the point of an authority to sell on credit, being regarded (from the form of the reporter's note and other circumstances) merely as his own, and not that of the court. The question was considered upon principle, as well as upon authority and the analogies derived from the practice of courts of equity, and the course of the legislature itself; and it was held, in accordance with the views in Rogers v. De Forest, that such a power did not necessarily hinder or delay creditors; that it more frequently facilitated the distribution of the assigned property, and increased the amount of the fund beyond what would be produced by a sale for cash only; that it was, indeed, in some cases essential to the due execution of the trust; that where it was not given in terms, the law would imply its existence; and that an authority which the law itself would give by implication, could not be regarded as illegal and fraudulent when given in terms. An appeal was taken from the decree of the court in this case, and the cause carried to the Court of Appeals, the result of which will be stated below.

In Burdick v. Post (12 Barb. 168), which came before the Superior Court of the Second District, at the Kings County General Term in 1851, an assignment containing a clause conferring upon the assignee power to sell on credit, was held by a majority of the court (Brown, J., dissenting) to be void on that ground alone. The decision of the Court of Appeals, in Barney v. Griffin, was considered as of binding authority, and that in Nicholson v. Leavitt disapproved. The court, in this case, say that a clause authorizing a sale on credit vitiates an assignment, on the same principle and for the same reason as would a provision directing the assignee to wait twelve months before proceeding to execute his trust. This case, also, was carried to the Court of Appeals. A decision to the same point had been previously made at the Ulster County Special Term in 1851. Whitney v. Krows, 11 Barb. 198.

The case of Nicholson v. Leavitt, on appeal from the Superior Court of the city of New York, as already stated, went up on the single question which forms the subject of this note, namely, whether a voluntary assignment by a debtor in failing circumstances was void by reason of its containing a clause authorizing the assignee to sell the assigned property *on credit*. The Court of Appeals (in 1852) reversed the judgment of the court below, holding that the assignment was fraudulent and void, for the general reason stated in the text. Nicholson v. Leavitt, 6 N. Y. 510. The court, in delivering their opinion, remark that the debtor cannot, by the creation of a trust, avoid the obligation of immediate payment, or extend the period of credit, without the assent of the creditor; and that the attempt to do this, however plausible may be the pretense, is in conscience and in law a fraud and nothing else. Id. 517. They further say that if the property is more than sufficient to discharge all the debts of the assignor, he has no right to delay creditors by giving credit on the sale of the property, with a view to increase the surplus resulting to him; this would be a trust for his own benefit, and consequently void by the first section of the "Act against fraudulent conveyances." 7 Paige, 37; Id. 518. Finally, it is remarked that the same considerations which made the legislature require an immediate sale, require an immediate payment also; and that a discretion may be as judiciously exercised in

of Vermont,[1] Wisconsin,[2] Minnesota,[3] Michigan,[4] and Illinois.[5] On the other hand, it has been decided in Alabama, that a provision in an assignment, authorizing the trustee to sell for cash or on credit, as shall, in his opinion, most comport with the interest of all parties concerned, was not sufficient to affect the validity of the deed.[6] The court refer to the case of Ashurst v. Martin,[7] in the same State, where it was said that such a power was necessary to enable the trustee to execute the trust, but must be exercised, in reference to the objects of the trust and the interest of the creditors, in good faith. The power to sell for cash or on good credit, it was said, does not vary in legal effect from the power to sell on such terms as he may deem expedient; and the court refused to pronounce that the reservation of such a power, within itself, renders the deed void. It is the duty of the trustee to execute the trust speedily, it is true, but yet in such a manner as will best subserve the interest of the creditors. He ought to sell for cash, or on such credit as will not unreasonably delay the payment of the debts. To require the sale, in all instances, to be for cash only, may

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postponing the time of sale of property, as in postponing the time of payment. Id. 521. The ruling of the chancellor in Rogers v. De Forest, was disapproved, and the decision in Burdick v. Huntting (Post) and Barney v. Griffin were relied on; the authority of the latter being now expressly confirmed. At a subsequent day in the same term, the judgment of the Supreme Court, in Burdick v. Post, was unanimously affirmed, for the reasons given in Nicholson v. Leavitt. Burdick v. Post, 6 N. Y. 522. And this ruling has been recognized in several subsequent cases, and may be regarded as the settled law of the State. See Gates v. Andrews, 37 N. Y. 657; Morrison v. Brand, 5 Daly, 40; Porter v. Williams, 9 N. Y. 142; s. c. 12 How. Pr. 107; Rapalee v. Stewart, 27 N. Y. 310.

In Judson v. Abeel (5 N. Y. Weekly Dig. 221), it was held that an authority to the assignee to sell the property "to the best possible advantage," did not avoid the assignment, on the ground that it allowed a sale on credit.

[1] Redfield, J., in Mussey v. Noyes, 26 Vt. 462, 470; Bennett, J., in Paige v. Olcott, 28 Vt. 465, 468, 469.

[2] Hutchinson v. Lord, 1 Wis. 286; see Id. 312, 313; Keep v. Saunderson, 2 Id. 42; s. c. 12 Id. 352; Haines v. Campbell, 8 Id. 187.

[3] Greenleaf v. Edes, 2 Minn. 264; Truitt v. Caldwell, 3 Id. 364; see Mower v. Hanford, 6 Id. 535; Benton v. Snyder, 22 Id. 247; Bennett v. Ellison, 23 Id. 242.

[4] Sutton v. Hanford, 14 Mich. 19.

[5] Pierce v. Brewster, 32 Ill. 268; Bowen v. Parkhurst, 24 Id. 257; Gardner v. Commercial Nat. Bank, 95 Id. 298.

[6] Abercrombie v. Bradford, 16 Ala. 560. [7] 9 Port. 566.

work a prejudice to all or some of the parties interested. "We think," it is finally observed, "the trustee ought to have a reasonable discretion in fixing the terms of the sale; and that he is clothed with such discretion as may benefit the creditors, if discreetly exercised, is not sufficient, within itself, to authorize us to pronounce the deed fraudulent."[1] The same doctrine has continued to be maintained in several later cases in the same State.[2] In Virginia,[3] Tennessee,[4] Maryland,[5] Mississippi,[6] Missouri,[7] Texas,[8] and Indiana,[9] also, a trust for sale on credit has been held valid. And express powers to trustees, to sell for cash or on credit, are of constant occurrence in deeds of trust in Virginia,[10] and other southern States.[11] In a case in Ohio,[12] where the question came before the Supreme Court and the New York cases were cited and relied on, it was held that an express power to sell on credit did not, *per se*, avoid an assignment. The court (Swan, J.), in delivering their opinion, observe: "A sale by a trustee, upon reasonable time of credit, taking the usual security, is an act of good faith, and is recognized by our laws relating to the settlement of the estates of deceased persons, and is frequently directed by the court. An absolute and inflexible rule, that a trustee for the payment of debts must at all times and under all circumstances, sell for cash, would not be for the interest of creditors. And if this be so, a provision in the trust deed in regard to credit, not specifically requiring a credit beyond what a court would sanction in the absence of

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[1] Dargan, J., 16 Ala. 565, 566.

[2] Evans v. Lamar, 21 Ala. 338; Shackelford v. P. & M. Bank of Mobile, 22 Id. 238; Goldthwaite, J., Id. 244; Miller v. Stetson, 32 Id. 161; s. c. 36 Id. 642; England v. Reynolds, 38 Id. 370.

[3] Dance v. Seaman, 11 Gratt. 778, 781, and cases cited.

[4] Gunnell v. Adams, 11 Humph. 85.

[5] Farquharson v. Eichelberger, 15 Md. 63; Berry v. Matthews, 18 Id. 537.

[6] Re Walker, 18 N. B. R. 56.

[7] Johnson v. McAllister's Assignee, 30 Mo. 327; Gates v. Labeaume, 19 Id. 17.

[8] Carlton v. Baldwin, 22 Tex. 724; Eicks v. Copeland, 53 Id. 581.

[9] Wright v. Thomas, 1 Fed. Reptr. 716.

[10] Johnston v. Zane's Trustees, 11 Gratt. 552; Dance v. Seaman, Id. 778.

[11] Evans v. Lamar, 21 Ala. 333.

[12] Conkling v. Conrad, 6 Ohio St. 611.

such provision, cannot, in our opinion, be deemed, *per se*, fraudulent."[1] In California, the rule adopted by the Supreme Court is, that a power to assignees to sell on credit is not conclusive, but only presumptive evidence of fraud.[2]

§ 222. But though, in New York, it is now settled that an express authority to an assignee to sell on credit avoids an assignment, it is not advisable to *prohibit* him from selling on credit, by an express provision in the deed. In a case in the Supreme Court, an assignment was sought to be avoided on the ground, among others, that it contained such a clause; and the court held that though, in the particular case, it was not, *per se*, evidence of fraud, so as to justify them in setting the assignment aside, it might become so in connection with other circumstances showing that a forced sale was intended, to the injury of the creditors;[3] but it has since been determined that such a clause does not of itself invalidate an assignment.[4]

§ 223. A direction to the assignees, to sell the assigned property at *retail*, and on credit, will render an assignment fraudulent and void.[5] And a power given to a trustee in a deed of trust, to sell property "gradually, according to the terms and manner of the grantor's business," will vacate the deed as to creditors.[6]

§ 224. *Implied Power to Sell on Credit.*—Not only has it been decided in New York and elsewhere, that an express

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[1] Conkling v. Conrad, 6 Ohio St. 620, 621. The court, after noticing the New York rule to the contrary, and citing the cases of Nicholson v. Leavitt and Burdick v. Post, continue to say: "But this seems to be law peculiar to New York; and the dissenting opinion of Brown, J., in the case of Burdick v. Post *et al.* above referred to, shows very conclusively to our minds that the decision of the majority cannot be sustained upon principle or authority; and we must refer to that dissenting opinion for the reasons upon which our own opinion is based." Id. ibid.; and see Hoffman v. Mackall, 5 Ohio St. 124.

[2] Billings v. Billings, 2 Cal. 107, 114.

[3] Van Rossum v. Walker, 11 Barb. 237.

[4] Grant v. Chapman, 88 N. Y. 293; Carpenter v. Underwood, 19 Id. 520; Stern v. Fisher, 32 Barb. 198.

[5] Meacham v. Sternes, 9 Paige, 398; Truitt v. Caldwell, 3 Minn. 364.

[6] Am. Exchange Bank v. Inloes, 7 Md. 380; Inloes v. Am. Exchange Bank, 11 Id. 73.

authority to sell on credit vitiates an assignment, but it has been further held in some cases,[1] that if such a power can be fairly inferred or implied from the language of the instrument, it will be equally fatal to its validity. It, therefore, becomes important to ascertain what words will be construed to confer such a power, or what amounts to a power to sell on credit.

It has already been stated[2] to be a common practice in drawing assignments, to leave the terms as well as the time and manner of the sale to the discretion of the assignees; they being directed, after taking possession of the property, to sell and dispose of it, "upon such terms and conditions as, in their judgment, they may think best and most for the interests of the parties concerned," or words of equivalent import. Such a clause has long been in use in this and other States, and will be found in the most approved collections of precedents.[3] It has recently been contended, however, that it amounts to an authority to sell on credit, and is, therefore, good ground for avoiding the assignment containing it. The most important cases in New York, in which it has been made the subject of construction by the courts, will now be briefly reviewed.

In Lyon v. Platner,[4] where the assignment contained a clause resembling the one in question, the Supreme Court held that authorized a sale upon credit, and was, therefore,

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[1] See, however, what is said by Redfield, Ch. J., in Mussey v. Noyes, 26 Vt. 462, 469, and see the note *in loc.*

[2] *Ante*, p. 318.

[3] Angell on Assign. 209, 215, referred to by Parker, J., in Kellogg v. Slauson, 11 N. Y. 302, 307.

[4] This case was cited by the court in Woodburn v. Mosher (9 Barb. 255), as decided in the Sixth District, in 1850; but it has not been reported. The case of Woodburn v. Mosher itself, has sometimes been relied on as an authority to the same point. See Murphy v. Bell, 8 How. Pr. 468. But the question in that case was rather as to the *time* than the *terms* of the sale, the assignees being directed "within convenient time as to them shall seem meet," to convert the property into money. The court held that this clause authorized the assignees to discharge their duties whenever it should suit their convenience, and that it rendered the assignment void, as operating to hinder and delay creditors. Monson, J., 9 Barb. 257; see the observations of Parker, J., in Kellogg v. Slauson, 11 N. Y. 307.

void. In Moir v. Brown,[1] the clause was in terms identical with the one in question, the assignees being authorized to sell and dispose of the property upon "such terms and conditions as, in their judgment they may think best and meet [most] for the interest of the parties concerned, and convert the same into money." The court (Hand, J.), thought that this language certainly gave a "broad discretionary power, sufficient, in an ordinary power of attorney, to sustain a sale on credit." But the point was not decided. In Schufeldt v. Abernethy,[2] however, in the Superior Court of the city of New York, where the assignment contained the same clause, the court held that the words, by a necessary implication, gave a discretionary power to the assignee to sell upon credit, and therefore rendered the assignment, on its face, fraudulent and void.

But in several other cases, embracing the latest decisions in the Supreme Court and Court of Appeals, such a clause has been sustained. Thus, in Whitney v. Krows,[3] it was held that it would not be construed as authorizing the assignees to sell on credit. The court further held that the fair construction of such a provision was, that the trustees were to exercise their judgment as to the manner of sale, but when they did sell they were to receive the money. In Southworth v. Sheldon,[4] the same view was taken; the court saying that the provision merely authorized the assignees to do what the law imposed upon them as a duty. In Kellogg v. Slauson,[5] where the same question was raised, the Supreme Court again held that the clause did not authorize a sale upon credit, and would not therefore render the assignment void, as hindering or delaying creditors. On

[1] 14 Barb. 39. [2] 2 Duer, 588. [3] 11 Barb. 198.

[4] 7 How. Pr. 414; New York Special Term, Jan. 1853. This case appears to be in conflict with that of Murphy v. Bell (8 How. Pr. R. 468), decided at the Monroe County Special Term, in the same month and year. But in the latter case, as in Woodburn v. Mosher, upon which the court relied, the clause in question seems to have had reference rather to the time of the sale than the terms. The court, it is true, laid stress upon the word "securities," as implying a sale on credit; but the reasoning on this point is not satisfactory.

[5] 15 Barb. 56.

appeal, the Court of Appeals affirmed the judgment.[1] These cases were cited and relied on by the Supreme Court in Nichols v. McEwen,[2] the court saying that the question was no longer open to discussion.

In Clark v. Fuller,[3] the Supreme Court held that a provision empowering the assignee to sell and dispose of the assigned property "in such manner as he shall deem best and most for the interest of the parties concerned, and convert the same into money," was not to be construed as authorizing a sale on credit, and therefore did not render the assignment void on its face.

In Bellows v. Patridge, the assignment authorized the assignee to convert the assigned property into money, by sale either public or private, "as soon as reasonably practicable, with due regard to the rightful interests of all the parties concerned, and in such a manner as might, in the judgment of the assignee, be for the best interests of the estate." On the hearing of the case at the special term, it was objected that this clause conferred a power to sell on credit, and consequently rendered the assignment void. But the court (Roosevelt, J.) overruled the objection, holding that, by the language of the instrument, it was only a "rightful"

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[1] 11 N. Y. 302. The court, in this case (Parker, J.) remarks: "It is certain that the 'terms and conditions' on which the property is to be disposed of, are left entirely to the discretion of the assignees. But that discretion is to be exercised within legal limits. The law implies a restriction not inserted in express words. It will not defeat the instrument by inferring that the assignor contemplated an illegal act. There is no express authority given in the assignment to sell on credit or do any other illegal act; and there is ample room, within legal limits, for the exercise of the discretion conferred. The assignees were at liberty to sell at public or private sale—in large or small quantities—or one article, with the privilege of taking more of the same kind at the same price. They might require a certain percentage to be paid at the time of the bid, and the balance on delivery, and might prescribe the time and place for delivery in gross or in parcels. The language of the assignment can be abundantly satisfied by a construction that shall support the instrument, and in such case, the rule is well settled that a construction shall not be given which shall defeat it." Id. 305.

[2] 21 Barb. 65; s. c. 17 N. Y. 22.

[3] 21 Barb. 128. But see Neally v. Ambrose, 21 Pick. 185, *contra*. It had been previously held, in Meacham v. Sternes (9 Paige, 398), that a provision that the property should be sold by the trustee "in such manner and at such reasonable times as should seem proper to him," did not authorize a sale at retail on credit. Rapalee v. Stewart, 27 N. Y. 311.

or "lawful" power which was intended to be given, and that if a power to sell on credit were not lawful, no such power was given. On appeal to the general term, the judgment of the court was affirmed.[1]

In Mann v. Whitbeck,[2] the assignment contained a clause authorizing the assignee, "generally to adopt such measures in relation to the settlement of the estate as would, in his judgment, promote the true interest thereof." It was held, on the authority of Bellows v. Patridge, and Whitney v. Krows, that this clause did not invalidate the assignment.

In Brigham v. Tillinghast,[3] the assignees were directed "as soon as practicable and expedient for the best interests of all concerned and interested," to convert the property assigned "into money or available means." The Supreme Court held the assignment good, but, on appeal, the Court of Appeals reversed the judgment, holding the assignment void on the ground that the words "available means" conferred, by necessary implication, a power to sell on credit.[4] The court (Dean, J.), in concluding their opinion in this case, say: "The true rule to be observed is this: An insolvent debtor may make an assignment of all his estate to trustees, to pay his debts, with or without preferences; but such assignees are bound to make an immediate application of the property. And any provision contained in the assignment, which shows that the debtor, at the time of its execution, intended to prevent such immediate application, will avoid the instrument; because it shows that it was made with 'intent to hinder and delay creditors in the collection of their debts.' Such an intent, expressed in the instrument

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[1] 19 Barb. 176. The case, as decided at the general term, is all that is here reported. It will be seen that the opinion of the court is not so much on the point of a power to sell on credit, as on that of a delay of the sale; the court holding that the clause in dispute "implies no authority to the assignee to delay the sale longer than the ordinary time required for the efficient performance of such a duty, which depends upon the peculiar circumstances of each case and the condition in which the assignor's affairs are placed, and does not render the assignment void."

[2] 17 Barb. 388.

[3] 15 Barb. 618. See McCallie v. Walton, 37 Ga. 611.

[4] 13 N. Y. 215.

or proved *aliunde*, is fatal alike by the language of our statute and the well settled adjudications of the English and American courts."[1]

In Wilson v. Robertson,[2] where the language employed was the same as in Kellogg v. Slauson, it was not regarded as objectionable, and the rule was there laid down as being that an assignment will not be construed as conferring an authority to sell on credit, when its language is consistent with a different interpretation, which will make it legal and valid. But in Rapalee v. Stewart,[3] where the direction was that the trust property be converted into cash or otherwise disposed of to the best advantage by the assignee, this was construed as conferring a power to sell on credit, and invalidated the assignment. In Benedict v. Huntington,[4] the assignees were directed to sell and dispose of the property upon such terms and conditions as in their judgment might appear best and most for the interest of the parties concerned, the court sustained the assignment. Mr. Justice Potter observed, where the language of an assignment can be abundantly satisfied with a construction that will support the instrument, the well settled rule should control that a construction should be given which will not defeat it. And in Townsend v. Stearns,[5] where the assignee was empowered to sell and dispose of the assigned premises at such time or times and in such manner as to him may seem to be most for the benefit and advantage of the creditors, the same rule of construction was applied and the assignment was sustained.

In Wisconsin, the New York doctrine, in regard to an implied power to sell on credit and its effect appears to have been adopted, and even extended. Thus, in Hutchinson v. Lord,[6] where the assignment empowered the assignee to

[1] 13 N. Y. 220. [2] 21 N. Y. 587. See Jessup v. Hulse, 21 N. Y. 168.

[3] 27 N.Y. 311. The assignment, however, was sustained as against the plaintiff, he having assented to and ratified it.

[4] 32 N. Y. 219. [5] 32 N. Y. 209.

[6] 1 Wis. 286. See the observations of Crawford, J., who goes into a critical examination of the meaning of the word "terms." Id. 313, 314.

sell in such manner, and "upon such terms and for such prices as to him should seem advisable," it was held that this was an authority to sell on credit, which necessarily would operate to hinder and delay creditors, and rendered the assignment fraudulent and void. And in the later case of Keep v. Sanderson,[1] where the provision objected to was in the exact words of that in Kellogg v. Slauson, the court held that it conferred an authority to sell on credit, which avoided the whole assignment.

In Vermont, the doctrine of an implied power to sell on credit, and its effect, does not seem to be approved, or rather the courts decline to infer such a power where none is expressly given. Thus, in Mussey v. Noyes,[2] where the assignment empowered the assignees, "as soon as practicable, and in the most beneficial manner," to convert the property into money, it was objected that this conferred a power to sell on credit. But the Supreme Court (Redfield, Ch. J.) held that the words would more naturally exclude such a power, especially where it was regarded as illegal; and that the power was neither expressly nor impliedly given. In the later case of Peck & Co. v. Merrill,[3] in the same court, the point as to the effect of an implied power to sell on credit was distinctly raised and argued by counsel. But the court passed it over without notice. In the still later case of Paige v. Olcott,[4] the court (Bennett, J.) quote the case of Mussey v. Noyes, as having been "decided upon a construction of the assignment, the court holding that no express power of sale was given in the instrument, and none should be intended in order to vitiate the assignment." And it may be stated as the general rule, that an authority to sell on credit will not be implied adversely to the assignment, from lan-

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[1] 2 Wis. 42; Crawford, J., Id. 59, 60. The court rely upon the previous case of Hutchinson v. Lord, *supra;* s. c. 12 Wis. 352; but see Norton v. Kearney, 10 Wis. 443.

[2] 26 Vt. 462, 468, 469; and see the note, ibid.

[3] Id. 686.

[4] 28 Vt. 465, 469.

guage susceptible of a different construction which will support the instrument.[1]

In a case[2] in Nebraska, the assignment allowed the assignee to dispose of the property "*in any manner whatsoever*, as freely and lawfully as the assignor could do himself, which the said party of the second part, trustee as aforesaid, may deem advisable to do, tending in his opinion, to convert the same into money for the benefit of all interested." It was held that this would authorize a sale on credit or an exchange, and that the deed was void on its face.

In Utah,[3] where a debtor assigned, dividing his creditors into three classes, and directed that "the times, places, and terms of selling the property shall be agreed on by the trustee and the majority interested of the first and second class creditors," it was held that the words "terms of selling" embraced the power to sell on credit, and that the assignment was fraudulent and void.

VIII. *Special Powers and Directions to Assignees.*

§ 225. *Power to Mortgage and Lease.*—A clause in an assignment of real property, authorizing the assignees to *lease or mortgage* the property, for the benefit of the creditors at large, is, in New York, void, under the statute of uses and trusts,[4] and inoperative. But it does not, of itself, avoid the whole assignment.[5] And where the trust is to sell *or* mortgage, and apply the proceeds to the payment of debts, the assignment is a valid instrument, under the statute, as to the trust to *sell*, and vests the estate assigned in the

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[1] Finlay v. Dickerson, 29 Ill. 9; Sackett v. Mansfield, 26 Ill. 21; Meeker v. Saunders, 6 Iowa, 61; Berry v. Hayden, 7 Iowa, 469; Booth v. McNair, 14 Mich. 19; McCallie v. Walton, 37 Ga. 611; Brahmstadt v. McWhirter, 9 Neb. 6; and see New York cases cited *ante* in the text.

[2] McCleery v. Allen, 7 Neb. 21. Compare Brahmstadt v. McWhirter, 9 Id. 6.

[3] Beuss v. Shaughnessy, 2 Utah, 492.

[4] Rogers v. De Forest, 7 Paige, 272; s. c. on appeal, *sub nom.;* Darling v. Rogers, 22 Wend. 483; Planck v. Schermerhorn, 3 Barb. Ch. 644, 646.

[5] Darling v. Rogers, 22 Wend. 483; Sandford, A. V. C., in Van Nest v. Yoe, 1 Sandf. Ch. 4, 6.

assignees, notwithstanding that the trust to *mortgage* is void.[1] And even a trust to mortgage, if expressed to be for the purpose of raising funds to pay charges upon the land, such as judgments and mortgages, would, it seems, be valid.[2] In Mississippi, a clause in an assignment by a bank, permitting the trustees to sell or pledge any of the property or effects conveyed, including the bank notes of the bank, in case any pressing emergency, not otherwise provided for, should render it necessary so to employ said bank notes, does not of itself vitiate the assignment, or render it fraudulent in law; and if the power be improperly exercised, it may be controlled and checked by a court of chancery.[3] In Maryland, an assignment reserving to the trustee the power to mortgage the assigned property, has been sustained.[4] In Illinois, an assignment is void if the property may be held until new debts are incurred, and then mortgaged to secure their payment or sold, and the proceeds devoted to their payment.[5] In a case[6] in Rhode Island, where part of the estate was under mortgage, and the deed authorized the assignee to sell at public or private sale, to buy in the premises, to re-sell without responsibility for loss, and also to mortgage, and from the proceeds to pay first the creditors secured by mortgage and then the other creditors, it was held that the assignment was valid as against creditors, for it did not appear that any benefit accrued to the assignor, at their expense from the powers given.

§ 226. *Power to Pay Insurance, Interest, and Incumbrances.*—An assignment will not be vitiated by a provision authorizing the assignees to effect an *insurance* upon a portion of the assigned property, and to keep good an insurance already existing upon another portion of the property, so

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[1] Darling v. Rogers, *ubi supra.*

[2] Id. ibid.

[3] Montgomery v. Galbraith, 11 Sm. & M. 555.

[4] Beatty v. Davis, 9 Gill, 211.

[5] Gardner v. Commercial Bank, 95 Ill. 298.

[6] Waldron v. Wilcox (R. I.), Index P, 128; see Beatty v. Davis, 9 Gill (Md.), 211; Montgomery v. Galbraith, 19 Miss. 555.

long as in their judgment it shall be necessary.[1] Neither will it be vitiated by a provision authorizing the assignees, if they shall deem it necessary, to pay the *interest* on a mortgage which is a prior lien upon the assigned property, and the principal and interest on another mortgage, if they shall deem it for the interest of the creditors to do so;[2] the assignees having, of themselves, the power to do these acts without any express authority from the assignor.[3]

§ 227. *Power to Employ Agents.*—So a power in an assignment, authorizing assignees to appoint and dismiss *agents*, and to pay them out of the proceeds of the assigned property, is unobjectionable; they having the same authority without such provision.[4]

§ 228. *Power to Compound and Compromise Debts.*—But a power given to assignees to declare future *preferences*, or change the order of preferences already given, will render the assignment void.[5] So a power to assignees *to compound* with all or any of the creditors, in such manner and upon such terms as they should deem proper, was regarded, in a leading case in New York,[6] as peculiarly objectionable and one that it was impossible to sustain;[7] although it was expressed with a proviso that

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[1] Whitney v. Krows, 11 Barb. 198.

[2] Id. ibid. So a direction to pay the rents and taxes on real estate until sold does not invalidate the assignment. Van Dine v. Willett, 38 Barb. 319; Eyre v. Beebe, 28 How. Pr. 333.

[3] 11 Barb. 198; Harris, J., Id. 201, 202.

[4] Vernon v. Morton, 8 Dana, 247; Hennessey v. The Western Bank, 6 W. & S. 300; Mann v. Whitbeck, 17 Barb. 388; Van Dine v. Willett, 38 Barb. 319; Casey v. Jones, 37 N. Y. 608; Nye v. Van Husan, 6 Mich. 329; Maennel v. Murdock, 13 Md. 164; Langdon v. Thompson, 25 Minn. 509. When the assignment contained a direction that the assignee should employ certain particular persons as attorneys in collecting in the estate, this direction was regarded as a badge of fraud. Carlton v. Baldwin, 22 Tex. 724.

[5] Barnum v. Hempstead, 7 Paige, 568; Green v. Trieber, 3 Md. 11; Strong v. Skinner, 4 Barb. 546; Sheldon v. Dodge, 4 Den. 217; Kercheis v. Schloss, 49 How. Pr. 284; see Stimpson v. Fries, 2 Jones' Eq. 156.

[6] Wakeman v. Grover, 4 Paige, 24; s. c. on appeal, Grover v. Wakeman, 11 Wend. 187.

[7] Walworth, C., in Wakeman v. Grover, 4 Paige, 41; Sutherland, J., in Grover v. Wakeman, 11 Wend. 203.

it did not interfere with the order of preference established by the assignment: the effect of the provision being considered to be to perpetuate the right of giving preferences, by vesting in the assignees an arbitrary power, in relation to the several classes of creditors, and of compounding with any one upon such terms as they might think proper.[1] But where an assignment contained a provision that nothing contained in the instrument should be considered as restricting or preventing the assignee from liquidating or compounding with any of the creditors, by making over, assigning or transferring any of the choses in action, debts or accounts due to the assignors, the court held this to be rather the reservation of a supposed existing right, than the grant of a power, and declined to presume a fraudulent intent from the clause.[2]

In a late case in the same State,[3] it was held that while a grant of power to the assignee to receive payment of debts by installments, did not avoid the assignment, yet a clause authorizing the assignee "to compromise with the creditors" of the assignor for all his debts and liabilities, if in the opinion of the assignee "it would be advantageous" to the creditors and the assignor, was held to render the assignment void; for its effect and intent was to delay the payment of debts, and create a trust for the assignor.

In Illinois[4] and Kansas,[5] a clause in a general assignment, authorizing the trustee to compound with the creditors, renders it void. In a case in the latter State, the assignment directed the assignee in the usual way to convert the assets into money, unless the indebtedness of the assignors could be paid or settled otherwise by amicable arrangement. This condition was held to render the assignment void in connection with the fact that the assets were slightly more than the liabilities, and that the plan was to induce a settlement

[1] Walworth, C., *ubi supra*; Sutherland, J., *ubi supra*.
[2] Van Nest v. Yoe, 1 Sandf. Ch. 4, 5.
[3] McConnell v. Sherwood, 84 N. Y. 522; affirming s. c. 19 Hun, 519.
[4] Hudson v. Maze, 3 Scam. 578. [5] Keevil v. Donaldson, 20 Kans. 165.

with creditors.[1] But a clause authorizing the assignee to compound with the assignor's *debtors*, has been sustained; as where the assignee was empowered "to compromise all bad and doubtful claims,"[2] or "to compound, compromise and settle the claims assigned, in his discretion."[3]

In New York, it is provided by statute[4] that the county judge may authorize the assignee to compromise or compound any claim or debt belonging to the estate of the debtor. But it has been decided[5] that a clause in the assignment simply authorizing the assignee to compromise such claims as in a sound discretion the interests of the trust require, does not conflict with the statute, nor invalidate the assignment. A similar statute exists in Indiana[6] and Ohio.[7]

§ 229. An assignment may contain a clause directing the trustees to *give notice* before making a dividend, and requiring the creditors to *prove their debts* before they should be entitled to a dividend.[8] So, where preferences are allowed, it has been held that an assignment may have a clause directing the assignee to give *notice* to the creditors to present their claims to him at a reasonable time and place, and

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[1] Keevil v. Donaldson, *supra*.

[2] Brigham v. Tillinghast, 15 Barb. 618.

[3] Bellows v. Partridge, 19 Barb. 176; White v. Monsarrat, 18 B. Mon. 809; Price v. Ford, 18 Md. 489; Carlton v. Baldwin, 22 Tex. 724; Watkins v. Wallace, 19 Mich. 57; Murphy v. Bell, 8 How. Pr. 468; see Conklin v. Conrad, 6 Ohio St. 611; Woodburn v. Mosher, 9 Barb. 255.

Where the intention of a provision that the assignee may compromise choses in action when he deems it expedient to do so, is simply to give him authority to settle doubtful claims, and is restricted to that class alone, the assignment is not void on its face. Lininger v. Raymond, 9 Neb. 40. An assignment executed with the intent of thereby effecting a compromise is void. Bennett v. Ellison, 23 Minn. 242.

[4] Laws of 1877, c. 466, § 23; 3 R. S. (7th ed.), p. 2281.

[5] Coyne v. Weaver, 84 N. Y. 386; Ginther v. Richmond, 18 Hun, 232; see Matter of Ransom, 8 Daly, 89; Jessup v. Herzfeld, 1 N. Y. Weekly Dig. 241; Matter of Youngs, 5 Abb. N. C. 346.

[6] R. S. of Ind. (1881), § 2678.

[7] R. S. of Ohio (1880), § 6350.

[8] Garland, J., in U. S. v. Bank of U. S., 8 Rob. (La.) 412; see Ashurst v. Martin, 9 Port. 566; U. S. Bank v. Huth, 4 B. Mon. 423. The English forms sometimes contain a clause requiring creditors to verify their debts or lose the benefit of the assignment. See Jones v. Whitbread, 20 Law J. C. P. (N. S.) 217; s. c. 5 Eng. L. & Eq. 431.

preferring such creditors as should comply with such notice over others.[1]

§ 230. A power may sometimes be given to an assignee to *defend suits* brought by creditors, and to defray the costs out of the assigned property. Thus, in Kentucky, where the assignment authorized the trustees to defend certain attachment suits against the debtors, and to retain so much out of the proceeds of the assigned effects as would indemnify them, it was held to be no objection to its validity.[2] So in New York, where an assignment contained a power to the assignee to defend all law, equity, and other proceedings which they [he] might deem necessary to the execution of the trusts; it was held to afford no marked evidence of fraud, and the court could not perceive much in it that the assignee could not have done if the whole clause had been omitted.[3] But where a debtor, in an assignment giving preferences, first provided for the payment of all costs and expenses necessarily incurred by the assignee in defending any suits that might be instituted against him by any creditor or other person, for anything growing out of the assignment, or in any way connected with it, it was held that the assignment was fraudulent against his creditors.[4] And if a debtor have ample property to pay all his debts, it is a fraud upon his creditors for him to assign all his property to an assignee, and to authorize such assignee to employ its proceeds in defending suits which might be brought against the assignor by his creditors to recover their several debts, the effect of such assignment being to delay his creditors in the collection of their debts.[5] In Missouri, a clause providing

[1] Ward v. Tingley, 4 Sandf. Ch. 476.

[2] Vernon v. Morton, 8 Dana, 247; Ewing, J., Id. 252, 265. Nor does the fact that the defense proved unavailing make any difference. Id.

[3] Sandford, A. V. C., in Van Nest v. Yoe, 1 Sandf. Ch. 4, 6.

[4] Mead v. Phillips, 1 Sandf. Ch. 83.

[5] Planck v. Schermerhorn, 3 Barb. Ch. 644. A provision in an assignment authorizing the assignee to use or employ the proceeds of the assigned estate in defending suits that might be brought against the assignor by his creditors to recover their several debts, would have the effect to hinder and delay creditors,

that the assignees shall not pay costs on the debts that have accrued or that may accrue on them by suit, has been held not to avoid an assignment.[1]

An assignment may have a stipulation and direction to the assignee to deliver merchandise *in specie* to certain preferred creditors at prime cost, the value to be settled by the assignee.[2] So it may have a stipulation and direction that no *interest* shall be paid out of the effects conveyed till the principal of all the debts is paid.[3]

But an assignment of a bond and mortgage payable in five years, in trust for the benefit of certain creditors, with a proviso that it should be held by the assignee until the expiration of the period it had to mature, and in no case parted with until that time; and that the assignee should then, and not before, proceed to collect the principal, was held to be fraudulent as against creditors; carrying on its face an intent to hinder and delay them.[4]

A provision empowering an assignee, "generally, to adopt such measures in relation to the settlement of the estate, as will, in his judgment, promote the true interests thereof," has been held not to render an assignment fraudulent and void upon its face.[5]

An assignment containing the clause "provided, however, that the said party of the second part (the assignee) shall pay no claims unless the correctness of the same shall be established to his satisfaction,"—the directions extending to all claims, and not being restricted to the creditors not named,—is fraudulent and void as to the creditors named, the amounts of whose claims are given.[6]

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and would render the assignment void. Levy's Accounting, 1 Abb. N. Cas. 181, and cases cited.

[1] Gates v. Labeaume, 19 Mo. 17.

[2] Bayne v. Wylie, 10 Watts, 309. [3] Ingraham v. Grigg, 18 Sm. & M. 22.

[4] Storm v. Davenport, 1 Sandf. Ch. 185. [5] Mann v. Whitbeck, 17 Barb. 388.

[6] Hill v. Agnew, 12 Fed. Reptr. 230.

IX. *Stipulations for the Benefit of Assignees.*

§ 231. A clause in an assignment, exempting the assignees from liability for effects that should not come to their hands, and for losses, &c., from the misconduct of agents, has been approved.[1] And where there are two or more assignees, it is usual to stipulate that each shall be liable only for his own acts and defaults, and not for those of his co-assignees. A clause in an assignment providing that the assignees shall not be answerable or accountable for the acts, receipts, neglects or defaults of any attorney or attorneys, agent or agents, that they may employ, nor for any misfortune, loss, or damage, which may happen without their willful neglect, does not vitiate the assignment where it contains a clause binding the assignees to act faithfully and justly in the execution of the trust.[2] But a provision that the assignee shall not be accountable for any defalcation committed by any clerk, agent, or assistant necessarily employed by the *assignors* or either of them, in the execution of the trusts of the assignment, has been considered a badge of fraud.[3] And a stipulation limiting the liability of an assignee or trustee, to his own *gross negligence* or willful misconduct, exonerates him from a great portion of the responsibility which the law attaches to his office; is considered evidence of an intent to hinder, delay, and defraud creditors; and has therefore been held to render the assignment void as against them.[4] So a provision that the assignee, "while acting in good faith, shall not be made or

[1] Hennessy v. The Western Bank, 6 W. & S. 300.

[2] Jacobs v. Allen, 18 Barb. 549; Baldwin v. Peet, 22 Tex. 708; Gordon v. Cannon, 18 Gratt. 887; Hennessy v. The Western Bank, 6 W. & S. 300; Rankin v. Loder, 21 Ala. 380. In Missouri, it has been held where a trustee is authorized by the deed of trust to appoint agents or substitutes, to assist in the management of the trust business, and he accepts the trust upon the express condition that he shall not be responsible for the negligence or misfeasance of any person except himself, should an agent or substitute appointed by him be guilty of malfeasance, a court of chancery will not hold him liable. O'Fallon v. Tucker, 18 Mo. 262.

[3] Van Nest v. Yoe, 1 Sandf. Ch. 4, 6.

[4] Litchfield v. White, 3 Sandf. S. C. 545; affirmed on appeal, 7 N. Y. 438.

held personally liable in the premises, in any manner," is such a restriction upon the liability of the assignee as renders the assignment fraudulent and void as against creditors; the rule being, that a reservation or restriction of the liability of the assignee to a degree less than that which the law imposes upon trustees, renders the assignment void.[1]

The clause "being responsible only for his actual receipts or willful defaults," annexed to the acceptance of the assignee, will not vitiate the assignment. It does not release the assignee from the exercise of due diligence in collecting the debts due the assignor.[2]

§ 232. *Provisions for Expenses and Services of Assignees.*—A provision may be made for the payment from the fund of the just and reasonable expenses, costs, charges, damages,[3] and commissions of executing and carrying the assignment into effect,[4] and may also provide for all reasonable and proper charges for attorney and counsel fees respecting the same.[5] But where the assignment provided that the assignee, who was a lawyer, should retain, over and above the expenses of the trust, a reasonable counsel fee, this was held to render the assignment void.[6]

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[1] Hutchison v. Lord, 1 Wis. 286; see Keep v. Sanderson, 2 Id. 42; Whipple v. Pope, 33 Ill. 334; McIntire v. Benson, 20 Id. 500; Finlay v. Dickerson, 29 Id. 9; True v. Congdon, 44 N. H. 48; Olmstead v. Herrick, 1 E. D. Smith, 310; Melcalf v. Van Brunt, 37 Barb. 621. A provision that the assignee shall not be accountable for property which does not actually come to his possession, renders the deed void, for he is bound to use due diligence to obtain possession. McIntire v. Benson, 20 Ill. 500; Finlay v. Dickerson, 29 Id. 9; True v. Congdon, 44 N. H. 48; Pitts v. Viley, 4 Bibb. 446.

[2] Thomas v. Clark, 65 Me. 296.

[3] Blow v. Gage, 44 Ill. 208.

[4] Eyre v. Beebe, 28 How. Pr. 333; Islen v. Dalrymple, 27 Id. 137; s. c. 2 Robt. 142; Jacobs v. Remsen, 36 N. Y. 668; Halstead v. Gordon, 34 Barb. 422.

[5] Butt v. Peck, 1 Daly, 83. See remarks of Robinson, J., in Levy's Accounting, 1 Abb. N. Cas. 182. But the debtor cannot contract with attorneys for services after the execution of the assignment. Hill v. Agnew, 12 Fed. Reptr. 330.

[6] Nichols v. McEwen, 17 N. Y. 22; Heacock v. Durand, 42 Ill. 230. But in Thompson v. Childress (1 Tenn. Ch. [Cooper], 369), it was held that an assignee who is also a solicitor or attorney will be allowed compensation for professional services as such in matters touching the trust estate.

X. *Reservations of Powers to Assignors.*

§ 233. Clauses in assignments, reserving to the assignor any power or control over the provisions of the instrument itself, or the property assigned by it, or over the disposition of it by sale, or the appropriation of its proceeds, are more uniformly fatal to their validity than even those which reserve to him a benefit out of the property through the assignee.

Thus, a clause reserving to the assignor a general power of revocation and the declaration of other trusts, renders the assignment fraudulent on its face and void.[1] Powers of this kind are, in the emphatic language of Chancellor Kent, "fatal to the instrument, and poison it throughout."[2] And "the law," in the words of the same eminent judge, "is so jealous on this subject, that if the deed contains a power in any way equivalent in its effects, to a power of revocation, it is fatal."[3] Thus, in an early case in England,[4] it was held by the King's Bench that a conveyance by an insolvent debtor, in trust, to pay debts, was fraudulent, because, among other things, it had a proviso enabling the grantor to *make leases* for any term, without rent; and this was considered as putting it in his power to defeat the whole settlement; for though the consent of the trustees was necessary, yet they were trustees of his own nomination. And in Maryland it has been held, that the reservation to the grantor of the power of making leases, avoids an assignment.[5] So, in another English case,[6] where the deed reserved to the grantor a power *to mortgage* the estate conveyed, it was held to be fraudulent; because the grantor having reserved a power to mortgage, and charge the estate with

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[1] Riggs v. Murray, 2 Johns. Ch. 565; Cannon v. Peebles, 4 Ired. L. 204; 2 Tuck. Com. [442] 431; Green v. Trieber, 3 Md. 11; Price v. Pritzer, 44 Id. 521.

[2] 2 Johns. Ch. 579. [3] Id. 579, 580.

[4] Lavender v. Blackstone, 3 Lev. 146; 3 Keb. 256, pl. 11.

[5] Green v. Trieber, 3 Md. 11.

[6] Tarbuck v. Marbury, 2 Vern. 510.

what sums he thought fit, he might have charged it to the full value; which amounted, in fact, to a power of revocation, rendering it fraudulent against the creditors.

§ 234. So a clause reserving, even indirectly, to the assignor the power of *changing* the order of *preferences* expressed in the assignment, will render the deed fraudulent.[1] But in North Carolina, it has been held that where the maker of the deed only reserves the privilege of adding to the number of preferred creditors others of the same class, the deed cannot be pronounced by the court fraudulent on its face; but it must be left to a jury to determine whether such provision was inserted with a fraudulent intent.[2] "It is not the mere fact," observes Chief Justice Ruffin in this case, "that the appropriation of the trust fund may be changed, or that the debtor may modify the appropriation by letting in other creditors existing at the time, that converts the power to do those acts into a fraudulent power of revocation, either literally or substantially. The true principle is, that if it appear expressly to be for the benefit of the grantor —as every general power of revocation must be—or to be a contrivance designed for that end, although covered by some form with a view to conceal that end, then it is fraudulent under the statute; but otherwise, there must be a purpose actually to deceive, found by the jury."[3]

A clause reserving to the debtor the power to appoint new trustees, as a consequence of the power of revocation, renders the assignment fraudulent and void.[4] So a clause reserving to the assignor the right to *name* the *successor* of the assignee, in case such assignee should wish to resign the trust, is good ground of objection to an assignment.[5]

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[1] Averill v. Loucks, 6 Barb. 470; *ante*, p. 245.

[2] Cannon v. Peebles, 4 Ired. L. 204. But where the assignment directed the assignee to pay such other debts as the assignors should thereafter specify out of any surplus which might be left after paying all the claims and debts provided for in the assignment, this was held not to make the assignment void *per se*. Hall v. Wheeler, 13 Ind. 371.

[3] 4 Ired. L. 209, 210. And see Stimpson v. Fries, 2 Jones' Eq. 156.

[4] Riggs v. Murray, 2 Johns. Ch. 565.

[5] Planck v. Schermerhorn, 3 Barb. Ch. 644. But in Connecticut it has been

An assignment of property in trust, to sell part of it to pay for advances, and to *retain* part of it, subject to the *future order of the assignor*, is intended only as a cover to keep off execution creditors, and has premeditated fraud upon the face of it.[1]

§ 235. A clause in a deed of trust, reserving to the debtor the power of *ordering a sale* at an earlier day than that prescribed by the deed, was held in North Carolina not to be objectionable.[2] But the reservation to the debtor of the power to direct the *terms and places* of the sale, was considered more objectionable, and one which, if followed as a precedent, might lead to great abuses. The court considered that the reservation of such a power was not easily reconciled with the absolute and *bona fide* appropriation by the debtor, of his property to the payment of his debts.[3] The deed, however, was not held void on this ground.

In Virginia, where a deed of trust contained a provision that if the debts secured by the deed were not paid by a day designated, then the trustee *when required by* a creditor named, or *the debtor himself*, should proceed to sell at auction as prescribed in the deed, and should first pay off the debts for which such creditor was bound, and then all others secured by the deed, which the *debtor should certify* as correct,

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held, even under the statute of 1853, that an assignment is not rendered void by a provision that, if the trustee therein named should decline to accept and execute the trust, the assignor should have the power of appointing another trustee in his stead; although the provision would be inoperative. Vansands v. Miller, 24 Conn. 180, 184.

In Wright v. Thomas (1 Fed. Reptr. 716) it was held that an assignment was not void under the statutes of Indiana, because, among other things, the assignors reserved in the deed the right to instruct the trustees as to their duties and also the right to remove one or all of the trustees with the consent of two-thirds in value of the creditors.

[1] Hart v. McFarland, 13 Penn. St. 182. A reservation of property to be subsequently selected by the assignors renders the assignment void on its face. Clark v. Robbins, 8 Kans. 574. In Burr's Ex'r v. McDonald (3 Gratt. 215), a provision in an assignment by a corporation, that the company should have power to direct the abandonment of any part of the property conveyed, was argued to be a power reserved to the grantors incompatible with the grant. But the objection was not noticed by the court. See Sipe v. Earman, 26 Gratt. 563.

[2] Cannon v. Peebles, 2 Ired. L. 449.

[3] Cannon v. Peebles, 2 Ired. L. 449; s. c. 4 Id. 204.

and a proper charge upon the fund—it was held, in affirmance of the judgment of the court below, that the deed was fraudulent on its face.[1] And in Michigan, where an assignment reserved to the assignor a control over the sale of the real estate assigned, by providing that it should not be sold until all the personal assets should be exhausted, unless with the consent of the assignor, it was held fraudulent and void in law, as against creditors not preferred or not provided for in the assignment.[2]

A conveyance by one indebted, in trust to sell, the grantor reserving a power of *appointment of the proceeds*, is fraudulent as to a prior creditor recovering judgment after the grantor had appointed the proceeds to creditors.[3]

The general rule, in fine, under this head, is, that the debtor must not only part with the property, but must also surrender up all power over the estate, and all power to interfere authoritatively in the appropriation of the proceeds.[4]

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[1] Spence v. Bagwell, 6 Gratt. 444, 450.

[2] Pierson v. Manning, 2 Mich. 445; Pratt, J., Id. 449; Sipe v. Earman, 26 Gratt. 568.

[3] Mitchell v. Stiles, 13 Penn. St. 306.

[4] Whallon v. Scott, 10 Watts, 237; Sheerer v. Lautzerheizer, 6 Id. 549; Coulter, J., in Mitchell v. Stiles, 13 Penn. St. 306, 309; Phelps v. Curts, 80 Ill. 109.

CHAPTER XII.

CONSIDERATION OF ASSIGNMENTS.

§ 236. There can be no question whether an assignment of a debtor's property to a trustee for the benefit of his creditors is for a valuable consideration or not, because the debts due to the creditors constitute a valuable consideration in the highest sense of the terms, and the obligation of the trustee to perform the trust, according to the provisions of the deed, is a sufficiently valuable consideration, so far as he is concerned. This was the opinion of Mr. Justice Story in the case of Halsey v. Whitney,[1] and it has been repeatedly recognized by the highest authority in this country as the general American rule on the subject. In the New York case of Dey v. Dunham, it was held by Chancellor Kent, that "a conveyance in trust to pay debts is a valid conveyance, founded on a good consideration."[2] The opinion of Mr. Justice McLean[3] was, that an assignment for the benefit of creditors cannot be considered void for want of consideration. In Pennsylvania, a voluntary conveyance by a debtor in failing circumstances, of property not subject to any lien, has always been considered as founded on sufficient consideration.[4] In New York, the nominal consideration of one dollar, or the fact that the as-

[1] 4 Mason, 206, 214; cited by Garland, J., in The United States v. Bank of the United States, 8 Rob. (La.) 405; and followed by Bennett, J., in Hall v. Dennison, 17 Vt. 310, 316. In the latter case, there was a nominal consideration specified in the deed, and also a direct covenant on the part of the trustee for the faithful performance of the trust. Hudson v. Maze, 4 Ill. 678; Meeker v. Saunders, 6 Iowa, 61; Nutter v. Harris, 9 Ind. 88; Exchange Bank v. Knox, 19 Gratt. 789; Haven v. Richardson, 5 N. H. 113; U. S. Bank v. Huth, 4 B. Mon. 423; Feimester v. McRorie, 12 Ind. 287; Thomas v. Clark, 65 Me. 296.

[2] 2 Johns. Ch. 182, 189; citing Stephenson v. Hayward, Preo. in Ch. 310; and see Kellogg v. Slauson, 15 Barb. 58, Allen, J.

[3] Lawrence v. Davis, 3 McLean, 177.

[4] Burd v. Smith, 4 Dall. 76; Wilt v. Franklin, 1 Binn. 502.

signee was a creditor, as appearing on the face of the assignment, is held sufficient to transfer the legal title to the property and vest it in him. The amount of the consideration was never material for this purpose; and it seems to be well settled that the relation of debtor and creditor between the parties, and the legal consequences of the assignment, constitute a sufficient consideration as between them.[1] In Missouri, a deed of assignment to a trustee for the benefit of creditors, is held to be for a valuable consideration.[2] In Michigan, such a deed, containing covenants on the part of the assignees, and stipulations beneficial to the creditors, is, in law, to be deemed and taken as founded upon a valuable consideration.[3] In Georgia, an assignment to creditors for the payment of their debts, or to trustees for that purpose, cannot be said to be without consideration, especially if one of the trustees be himself a creditor, and the conveyance purport to be founded upon a consideration, however small.[4] And in Virginia, the insertion of a nominal consideration (as of five dollars) in a deed of trust for creditors, is no ground of objection to its validity.[5] In Mississippi, it has been held that a deed of trust, as security for a debt, is *prima facie* valid, and a claimant under such deed is not bound to show a consideration for it in the first instance.[6] And in Kentucky, where the facts proved amount to *prima facie* evidence of the assignor's indebtedness, further proof will be dispensed with in the absence of countervailing evidence.[7]

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[1] Nelson, J., in Cunningham v. Freeborn, 11 Wend. 240, 250.

[2] Gates v. Labcaume, 19 Mo. 17.

[3] Hollister v. Loud, 2 Mich. 309.

[4] Jones v. Dougherty, 10 Ga. 273.
The promise of the assignee to sell and divide the proceeds of the property assigned among the creditors, is a sufficient consideration for the assignment. Block v. Peter, 63 Ga. 260; see Code, § 2744.

[5] Johnston v. Zane's Trustee, 11 Gratt. 552, 564. In Exchange Bank v. Knox, 19 Gratt. 789, it is said to be well settled that the trustees and beneficiaries in a deed of trust to secure *bona fide* debts are purchasers for a valuable consideration, citing Wickham v. Martin, 13 Gratt. 427; Evans v. Greenhow, 15 Gratt. 153.

[6] Brown v. Bartee, 10 Sm. & M. 268.

[7] Vernon v. Morton, 8 Dana, 247, 253.

In Maryland,[1] the assignee is not required to make affidavit that the consideration is true and *bona fide*, as is required of grantees in certain cases by the code.[2]

§ 237. In Massachusetts, however, prior to the statute regulations on the subject of assignments, a different rule prevailed, growing out of the local law which required the *assent* of creditors to give them validity. The consideration of an assignment in this State was held to depend upon the circumstance whether the creditors had become parties to it, or had otherwise assented to its provisions. If no creditor became a party, the deed was without consideration, or, as it was expressed, there were no *cestuis que trust*, and so no trusts, and the consideration entirely failed.[3] If the creditors elected to become parties, or to assent, and their debts amounted to as much as the assigned property, this completed the intended consideration, rendered the conveyance effectual against other creditors, and vested the whole property in the assignees.[4] If the debts of the assenting creditors were of less amount than the property assigned, they constituted a good consideration *pro tanto*, and gave the assignee a right to retain to the amount of such debts.[5] In other words, it was the rule that the creditors must assent in sufficient numbers and value to cover the property assigned, otherwise the consideration might be deemed inadequate and void as to the non-assenting creditors, though good as to those assenting.[6] This was closely following the rule, as long settled in England, that to constitute a valid

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[1] Mackintosh v. Corner, 33 Md. 598; Hoopes v. Knell, 31 Id. 550.

[2] Code of Md. (1878), art. 44, § 51.

[3] Morton, J., in Fall River Iron Works Co. v. Croade, 15 Pick. 11, 15. Assignments in trust for the benefit of creditors, the only consideration for which is the acceptance of the trust, are of no effect against creditors who do not assent to them, and who by trustee process, or otherwise, attach the property described in the instrument of assignment. Swan v. Crafts, 124 Mass. 453.

[4] 15 Pick. 16; see Everett v. Walcott, Id. 94, 97; Douglas v. Simpson, 121 Mass. 281.

[5] 15 Pick. 16.

[6] Woodbury, J., in Adams v. Blodgett, 2 W. & M. 237; citing Russell v. Woodward, 10 Pick. 408.

consideration for a conveyance to a trustee for the payment of debts, within the statute of Elizabeth, one or more creditors must have become parties to the conveyance,[1] or have agreed or assented to it, or in some manner have become privy to it.[2] This rule has already been alluded to, in considering the parties to assignments, and will receive further attention under a future head.

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[1] Roberts on Fraud. Conv., pp. 429, 431, 432, 434, 437.

[2] Acton v. Woodgate, 2 M. & K. 492; Smith v. Keating, 6 M., G. & S. 136. It was remarked by Mr. Justice Story, in the case of Halsey v. Whitney (4 Mason, 206), that "as to trusts created for the benefit of creditors, and to which they are not, technically speaking, parties, if *bona fide* made, they are unquestionably valid by the law of England, and pass a legal estate to the trustee." Id. 214. But the following extracts from Mr. Roberts' work, just cited, present the subject in a different view. "A general conveyance or assignment to a stranger, in trust to pay the debts of the person conveying, is clearly not a consideration sufficient even to raise a use upon a covenant to stand seized." Rob. Fraud. Conv., p. 429. "That the mere destination of the property to the object of paying the debts of the grantor, is not sufficient to raise the use upon a covenant to stand seized, or bargain and sale, appears from Lord Paget's [case], 1 Leon. 194." Id. ibid. "That such a conveyance for payment of debts, to which no creditor is a party, cannot support itself, under the statutes of Elizabeth, against purchasers or discontented creditors, is a proposition flowing pretty clearly from the general analogy of the reported decisions, and deducible from the very plan and spirit of the statutes themselves." Id. 431. "But if a creditor be a *party* to such a conveyance to a trustee for payment of debts, however open the transaction may still be considered to the imputation of fraud, from concomitant circumstances, there is a clear valuable consideration to support the deed." Id. ibid. And as to the present rule in England, see further, *ante*, p. 167, note 2.

CHAPTER XIII.

TRUSTS OF ASSIGNMENTS.

§ 238. The *trusts* of an assignment for the benefit of creditors constitute a very important feature of the transfer. These trusts, in one form or other, enter into the composition of all assignments which contemplate provision or security for creditors (as distinguished from transfers in absolute and final payment and satisfaction); embracing not only such as are made to *trustees* formally appointed by the assignor, distinct from the creditors or *cestuis que trust*, but such as are made *directly* to creditors themselves.

In one sense of the word, there is but a *single* trust created by any assignment for the benefit of creditors; the term being, properly, expressive of the *confidence* reposed by the assignor in the trustee or assignee, to carry into effect the *entire* arrangement and disposition of the assigned property and its proceeds, as declared and directed by the assignment; and also of the *whole line of duty* devolving upon the assignee in consequence. In this general sense, the assignor is said to *create*, and the assignee to *execute* the trust; and the trust itself is said to be *entered upon* by the latter, and to be *closed* when all the purposes of the assignment are accomplished. But the term is also used in a more limited sense, and with reference to certain particular objects or results of the assignment, as distinguished from others. In this sense, there may be *several* trusts created by, or growing out of one assignment; but they are all reducible under two general heads—*express*, and *implied* or *resulting* trusts.

§ 239. *Trusts must be Declared.*—The *express trusts* of an assignment are the expressions or designations by the assignor, of the particular objects or purposes for which it is

made; and they usually take the form of *directions*, more or less minute, to the assignee or trustee, how to dispose of the property assigned. In the great majority of cases they are expressed in the same instrument which contains the transfer; but they are sometimes embodied in a separate instrument, called a *declaration of trust*, bearing even date with the absolute conveyance, and accompanying it.[1] They may even be declared by parol;[2] but this is not usual.

It may be considered as well settled, that every valid assignment must declare the uses to which the property assigned is to be applied, and must settle the rights of creditors under it, and not leave to the assignee or reserve to the assignor himself the right of subsequently doing so.[3]

The trustee is always bound by any restrictions contained in the writing which creates the trust.[4] The conditions attached to the trust are regarded as a part of the transfer, and the conditions and the transfer stand or fall together.[5]

§ 240. *Implied* or *resulting trusts* are such as result from the transfer, by intendment and operation of law. A trust may be thus implied for the benefit of a creditor. Thus, in a recent case, where a debtor made an assignment of his property, in trust, to pay any judgment which the United States might recover against him and the sureties on his official bond, as collector of customs; and after the recovery of such judgment, the plaintiffs in it filed a bill for an

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[1] See *ante*, p. 172.

[2] Lord Nottingham, in Cook v. Fountain, 3 Swanst. 585; 2 Story's Eq. Jur. § 1195, note; see Boyden v. Moore, 11 Pick. 362. But declarations of trust in real estate, are almost uniformly required to be in writing. In Britton v. Lorenz (45 N. Y. 51, affirming 3 Daly, 28), parol proof was introduced to show that a bill of sale, absolute on its face, was really made upon a trust to pay certain debts and distribute the residue among other creditors. The instrument, however, was held invalid as a general assignment because not acknowledged. See *ante*, pp. 171, 172.

[3] Averill v. Loucks, 6 Barb. 476; Sheldon v. Dodge, 4 Den. 220; Caton v. Mosely, 25 Tex. 374; Kercheis v. Schloss, 49 How. Pr. 284; Malcolm v. Hodges, 8 Md. 418.

[4] Ogden v. Peters, 21 N. Y. 23; Goodrich v. Proctor, 1 Gray, 567; Purdie v. Whitney, 20 Pick. 25; Gould v. Lamb, 11 Metc. 84.

[5] Jessup v. Hulse, 21 N. Y. 168, Seldon, J.

account by the trustees, and the application of the trust funds to the payment of the judgment; it was held that a trust in favor of the plaintiffs was created by the assignment by implication of law, and that the bill was properly filed.[1] But resulting trusts are, properly, those which arise out of an assignment for the benefit of the assignor himself; and such a *result* takes place whenever there is a surplus of property or its proceeds remaining undisposed of, after the execution of the express trusts;[2] whether all the creditors are paid or not.[3] If all are paid, and there is no express reservation of the surplus to the assignor, it constitutes a resulting trust for his benefit, by mere operation of law,[4] which he may enforce against the assignee. And so, if only a portion of the creditors are paid, and a surplus of property or proceeds remains with the assignee, a trust for the assignor results by the operation of the instrument; with this very material difference, however, that such a resulting trust frequently avoids the whole assignment, being held equivalent to an express reservation for the debtor's own benefit.[5]

§ 241. *Express Trusts.*—The principal express trusts of every assignment for creditors, are the trusts, to *collect* the property; to convert it into money by *sale;* and to *distribute* it among the creditors provided for. But these are sometimes varied by the assignor. Thus, instead of the trust to sell and pay, there may be a trust to deliver certain goods *in specie*, to certain creditors.[6] So, the leading trusts just mentioned may be, and usually are, subdivided into minor trusts, or specific directions to the assignee, such as, to collect the debts due the assignor; to sell in a certain way; to reserve

[1] United States v. Hoyt, 1 Blatchf. C. C. 332; Field v. Flanders, 40 Ill. 470.

[2] 2 Story's Eq. Jur. § 1196 a.

[3] See Wilkes v. Ferris, 5 Johns. 335; Dubose v. Dubose, 7 Ala. 235.

[4] Halsey v. Whitney, 4 Mason, 206; Story, J., Id. 223; In the Matter of the Estate of Potter Paige, 54 Penn. St. 465.

[5] Dana v. Lull, 17 Vt. 390, 397; Burd v. Smith, 4 Dal. 76; Hooper v. Tuckerman, 3 Sandf. S. C. 311; Malcolm v. Hodges, 8 Md. 418.

[6] Bayne v. Wylie, 10 Watts, 309.

the expenses of the trust; to pay the creditors in a certain order, and the like.[1]

In some of the States, the trusts of an assignment are governed by statute provisions regulating trusts generally. Thus, in New York, the only express trust that can be created in an assignment of lands for the benefit of creditors, is a trust to *sell*, and to apply the proceeds to the payment of the debts.[2] And where an express trust is created for any other purpose, it is declared that no estate shall vest in the trustees.[3]

§ 242. *Passive Trusts.*—A mere passive trust to hold property for another's use, cannot exist under the laws of New York. It must be created for one of the active objects enumerated in the statute, and every estate or interest not embraced in the trust and not otherwise disposed of, reverts to the grantor as a legal estate.[4] So when the assignor conveyed property to a trustee to sell, and directed that the avails over and above the expenses should constitute a fund for the payment of his debts, "and the residue, if any, should be invested in some safe and proper manner for the grantor's use during life, or in case of his death before the completion of the trust, paid over and distributed to his heirs at law as by statute in case of persons dying intestate,"—held that what remained after the payment of the debts vested at once in the grantor, and that after a settlement by the trustee and the death of the grantor, his heirs at law could not maintain an action for an accounting against the trustee.[5]

Where a trust, valid under the statute, is coupled with another trust which is invalid, as where a trust to sell land

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[1] An assignment in trust for each and all creditors of the firm, is sufficiently specific; such a trust under the law imposes well defined duties. Forbes v. Scannel, 13 Cal. 242. An assignment for the payment of debts, generally without any limitations or directions, confers upon the trustee the right to sell. Planck v. Schermerhorn, 3 Barb. Ch. 644.

[2] Rev. Stat. [728, 729]; 3 R. S. (7th ed.) p. 2181, § 55; Barnum v. Hempstead, 7 Paige, 568; Rogers v. De Forest, Id. 272; Darling v. Rogers, 22 Wend. 483.

[3] 1 Rev. Stat. [729]; 3 R. S. (7th ed.) p. 2182, § 58.

[4] Kittell v. Osborn, 4 Sup. Ct. (T. & C.) 45.

[5] Ibid.

is coupled with another trust not authorized by statute, as to mortgage or incumber, this was held valid as a trust to sell, though void as a trust to mortgage, and the assignment operates as a transfer vesting a title in the assignee. But the rule, as we shall see, is different where one of the trusts is fraudulent, for in that case the fraudulent interest permeates and vitiates the whole instrument.[1]

§ 243. *Trusts for Assignor.*—Another important statute provision in New York and some other States, is that which declares that "all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust *for the use of the person making the same*, shall be void as against the creditors, existing or subsequent, of such person."[2] Under this section of the New York statute, it was held in Goodrich v. Downs,[3] that where an assignment shows, on its face, that it was made in trust for the use of the assignor, either in whole or in part, the court is bound to pronounce the transaction void. In the case of Curtis v. Leavitt,[4] in the Court of Appeals, the exposition and application of this statute was made the subject of very elaborate discussion, both in the arguments of counsel and in the opinions of the court. And it was then determined that the statute applies only to conveyances, &c., wholly or primarily for the use of the grantor, and not to such as are created for other and active purposes, where the reservations are incidental and partial only.

The principal rules in regard to the trusts of an assignment, which remain to be considered, are the following: that all express trusts must be openly declared by the assignor, a secret trust being always void,[5] and when once de-

[1] Darling v. Rogers, 22 Wend. 483; rev'g Rogers v. De Forest, 7 Paige, 272; see Barnum v. Hempstead, 7 Id. 568.

[2] 3 Rev. Stat. (7th ed.) p. 2327, § 1. See *post*, Chap. XXV, where similar enactments in other States are noticed.

[3] 6 Hill, 438. [4] 15 N. Y. 9, 297; see Wilson v. Robertson, 21 Id. 587.

[5] Passmore v. Eldridge, 12 S. & R. 198; McAllister v. Marshall, 6 Binn. 338; McCullough v. Hutchinson, 7 Watts, 434; Russell v. Woodward, 10 Pick. 407; Foster v. Saco Manufacturing Co. 12 Id. 451; Shaw, C. J., Id. 453; Parker, C. J.,

clared, cannot afterwards be revoked or altered;[1] that there must be no express trust for the use or benefit of the assignor,[2] nor any resulting trust in his favor, until after payment of all the debts;[3] that the trusts declared must be coextensive with the property assigned;[4] and that there must be no trust to hinder, delay, or defraud creditors.[5]

These topics have already been partially considered, and will receive further illustration under the head of "Fraudulent and void assignments."

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in Hills v. Elliott, 12 Mass. 26, 31; Anderson v. Fuller, 1 McMullan, 27; Edrington v. Rogers, 15 Tex. 188; Wheeler, J., in Wright v. Linn, 16 Id. 42; Caldwell v. Williams, 1 Ind. 405; Comstock, J., in Curtis v. Leavitt, 15 N. Y. 120. "There is no plainer evidence of fraud than an absolute paper transfer by an insolvent, with a secret parol trust in contravention of such conveyance." Chilton, J., in Bryant v. Young, 21 Ala. 264, 278; Nesbitt v. Digby, 11 Ill., 387; Humphries v. Freeman, 22 Tex. 45.

[1] See *ante*, p. 316. [2] See *ante*, p. 279. [3] See *ante*, p 290.

[4] See *ante*, p. 291. [5] See *post*, Chap. XXV.

CHAPTER XIV.

EXECUTION OF THE ASSIGNMENT.

The assignment having been drawn up in due form, and the necessary schedules attached, the next proceeding is the *execution* of it by the persons named as parties. In most cases the instrument is under seal, and where it conveys real estate, or contains covenants by either party, this formality should not be omitted. The schedules should be dated and executed, as well as the assignment itself.

§ 244. *Execution by Assignor.*—It is, of course, indispensable that the assignment should be executed by the assignor, or, if there be several, by all of them. This may, however, be done by attorney, under proper power for that purpose.[1] In cases of partnership, we have seen that one partner may execute the assignment in behalf of the firm, if with the concurrence or by the authority of his copart-

[1] A power of attorney executed by one of several partners, subsequent to the execution of the assignment by the others, authorizing the assignment of the property of the firm, but omitting all reference to the separate estate of the partner giving the power, does not amount to a sufficient execution on the part of such partner. In re Wilson, 4 Barr, 480. Where the deed of assignment offered in evidence by a plaintiff purported to have been executed by one of the assignors by attorney, and the defendants objected that there was no proof of the execution of the power, it was held that the acknowledgment of the deed in the probate bond sued on extended to everything necessary to prove the due execution of the deed, and superseded further proof of the power. Clark v. Mix, 15 Conn. 152. A power of attorney to convey or assign away real estate in payment, or to secure the payment of debts, authorizes the attorney to make an assignment of such real estate for the benefit of creditors. Marshall v. Shibley, 11 Kans. 114. There are cases from which it seems that under the New York statute, requiring assignments to be acknowledged, an assignment cannot be executed by an attorney in fact. Adams v. Houghton, 8 Abb. Pr. N. S. 46; Cook v. Kelly, 14 Abb. Pr. 466; affirming 12 Id. 85. But this rule does not preclude the partners who remain after one of their number has absconded, from executing an assignment of the assets of the firm. National Bank v. Sackett, 2 Abb. Pr. N. S. 286. And it seems that non-resident members of a firm are not necessarily included in the statutory requirement of a personal execution and acknowledgment by each of the assignors. Darrow v. Bruff, 36 How. Pr. 479; distinguishing Adams v. Houghton, *supra*. But in the late case of Lowenstein v. Flauraud (82 N. Y. 494; affirming 11 Hun, 399), it is settled that an assignment may be executed and acknowledged by attorney; see s. c. *post*, § 249 and Baldwin v. Tynes, 19 Abb. Pr. 32.

ners.[1] The better course is to have it executed by all. But where the assignment was executed by all the partners, it was deemed to be their joint act, and not to pass their individual property, there being no specific reference to their individual property in the body of the assignment.[2]

In Indiana[3] it is provided by statute that a surviving partner or partners of any firm doing business in that State shall have full power to make assignments under the act. Notwithstanding the rule that one partner cannot bind his copartners by *deed*, the mere circumstance that an assignment by one or more of several partners is under *seal*, will not invalidate it, if the property proposed to be conveyed is of such a description as might have been conveyed without deed, or that a title to it would have passed by the mere act of delivery;[4] the rule being, that where a seal is not essential to the validity of a contract, the addition of a seal will not vitiate it.[5]

The cases in which assignments are executed by the wives of the assignors, have already been noticed.[6]

In regard to schedules, it has been held that schedules not dated, but referred to in the assignment as bearing even date with the assignment, will be taken to have been executed at the same time, and this fact may be proved by parol.[7]

§ 245. *Execution by Assignee.*—Where the assignee is formally named as a party to the assignment, as where it is drawn in bipartite or tripartite form, and especially where

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[1] See *ante*, p. 121. In the English case of Bowker v. Burdekin (11 Mees. & W. 128), a deed of assignment purporting to be made by three partners of a firm, but executed by one of them only, was held to operate to convey the share of the one who executed. But see Havens v. Hussey, 5 Paige, 30, *contra*.

[2] Derry Bank v. Davis, 44 N. H. 548.

[3] R. S. of Ind. (1881), § 2683.

[4] Anderson v. Tompkins, 1 Brock. 456; Tapley v. Butterfield, 1 Metc. 515, 519; Everit v. Strong, 7 Hill (N. Y.), 585; Deckard v. Case, 5 Watts, 22; Sale v. Dishman's Ex'rs, 8 Leigh, 548; McCullough v. Sommerville, 8 Id. 415. In this last case, the partner did not even execute the assignment in the name of the firm, but in his own individual name, and yet it was held to be no objection.

[5] Robinson v. Crowder, 4 McCord's L. 519.

[6] *Ante*, p. 165.

[7] Dana v. Bank of the United States, 5 W. & S. 223.

the instrument contains any provision for its execution by him, or a covenant to be performed by him, it is necessary that he should execute it as well as the assignor. But where this is not the case, he need not become a party by signing.[1] An assignment is good, if the assignee does not execute it, or enter into any covenant to perform the trusts. If it is executed by the assignor, and delivered to the assignee, and he accepts it, and enters upon the performance of the trusts, he is as much bound as if he had executed it.[2]

In some of the States, assignees execute by signing and sealing a written acceptance, at the foot of the deed, immediately following the signature of the assignor.

§ 246. *Execution by Creditors.*—Assignments tripartite, as we have seen,[3] are drawn with express reference to their being executed by the creditors, as well as the assignor and assignee; and unless executed by some of the creditors, they are inoperative.[4] It is usual, in such assignments, to limit a time within which they must be executed by the creditors, as a condition of their participating in their benefits. Where this is the case, the condition must be complied with; and creditors will not be permitted to become parties by signing after the expiration of the time limited, provided they have had seasonable notice of the assignment, or provided proper means have been taken to give the notice.[5] In some States, the time for creditors to become parties is fixed by statute. Thus, in Maine, before the insolvent law,[6] the assignee was required to give three weeks notice of the assignment, within fourteen days after its execution; and three months from the execution of the assignment were allowed to creditors to become parties.[7]

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[1] Flint v. Clinton Co. 12 N. H. 430.

[2] Cunningham v. Freeborn, 1 Edw. Ch. 256; affirmed on appeal, 11 Wend. 240.

[3] *Ante*, pp. 166, 201.

[4] Marston v. Coburn, 17 Mass. 454; but see Shearer v. Loftin, 26 Ala. 703; Gale v. Mensing, 20 Mo. 461.

[5] Phœnix Bank v. Sullivan, 9 Pick. 410; see Dedham Bank v. Richards, 2 Metc. 105.

[6] See p. 32, *ante*.

[7] R. S. of Me. (1871), c. 70, § 4.

In Massachusetts, before the statute of 1836, regulating assignments, it was held that a creditor who did not execute, within the time limited, an assignment for the benefit of such creditors as should become parties within a certain time, was not entitled to become a party to it, or to have the benefit of it, although no distribution had been made before he requested permission to execute it, and although it contained no release to the debtor.[1] And where the assignment contained a release, it was held that a creditor executing the deed after the time limited, did not become a party so as to release his debt.[2] But an assignment under the statute of 1836, was held not to be void, as against subsequent attaching creditors, because it was not executed by any creditor within a reasonable time.[3] A promise to a creditor to pay his demand in full, though it should not be so paid from the proceeds of the assigned property, in order to induce him to become a party to an assignment, is fraudulent and void.[4]

In Missouri, it has been held that an assignment by a debtor for the benefit of certain preferred creditors, the balance to be distributed *pro rata* among the remaining creditors, provided they will release the debtor from further liability, is of no avail until executed by the creditors; and the levy of an execution before the deed is executed, will prevail over it.[5] And in another case in the same State, it was held that a deed of assignment for the benefit of such creditors as should, within a given time, become parties thereto and execute a release, would be of no avail until executed by the creditors, even though such deed were not void on account of the stipulation for a release.[6] But in a much later case, where the deed required that the creditors should sign it in order to receive any benefit from it, but none

[1] Phœnix Bank v. Sullivan, 9 Pick. 410; see Battles v. Fobes, 21 Id. 239; Dedham Bank v. Richards, 2 Metc. 105.

[2] Battles v. Fobes, 21 Pick. 239; s. c. 2 Metc. 98.

[3] Shattuck v. Freeman, 1 Metc. 10.

[4] Ramsdell v. Edgarton, 8 Metc. 227.

[5] Swearingen v. Slicer, 5 Mo. 241.

[6] Drake v. Rogers, 6 Mo. 317.

signed it, it was held that this did not render the conveyance void, as matter of law.[1] And in a case in Alabama, it has been held that a deed of trust which conveys property absolutely for the benefit of specified creditors, although it purports on its face to be tripartite, does not require to be signed by either the trustee or the creditors, to give it effect.[2]

As assignments intended to be executed by creditors generally contain a release of the debtor, a creditor ought to satisfy himself on this point before signing. A want of knowledge that the instrument contained a release, will not, after signing, avail him.[3] In an English case, where a deed of composition with an assignment in trust for creditors was construed to include a release of a debt guaranteed, it was held, in an action against the surety, to be no answer, either on legal or equitable grounds, to a plea setting out the release, that the plaintiffs executed as creditors but as trustees, and solely for the purpose of accepting and declaring the trusts, and not with the intention of releasing the debt; that they did not sign the list of creditors; and that, if the deed operated to release the debt, it was executed by mistake and in ignorance that such would be its legal effect.[4]

In a case in Massachusetts, where an assignment by an insolvent debtor, of a part of his property in trust for the benefit of his creditors, provided for the payment, first, of certain sureties, also creditors, including the plaintiff, who was one of the assignees, in full, if the property should be sufficient; otherwise, *pro rata;* and then of such other creditors as should become parties to the assignment, in full or *pro rata;* and the assignees covenanted to dispose of the property, and pay over the proceeds within one year; and the

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[1] Gale v. Mensing, 20 Mo. 461.

[2] Shearer v. Loftin, 26 Ala. 703; and see Tennant v. Stoney, 1 Rich. (S. Ca.) 222.

[3] See Parsons v. Gloucester Bank, 10 Pick. 533.

[4] Teed v. Johnson, 34 Eng. L. & Eq. 545.

creditors becoming parties to the assignment agreed "upon being paid in manner aforesaid, to cancel and discharge their respective demands,"—it was held that the execution of the assignment by the plaintiff, and his acceptance of the trust, operated as a full and immediate discharge and satisfaction of his claims, both as surety and as creditor: so that a subsequent conveyance to him, by the debtor, of other property, as further security for those claims, was without consideration, and invalid against a creditor not a party to the assignment.[1]

§ 247. *Attestation of Execution.*—The assignment, like all other conveyances of property, should be executed before witnesses, who attest it in the usual manner. In New Hampshire, an assignment, embracing real estate, in order to be valid, must be attested by *two* witnesses.[2] If it be not thus attested, the title to the real estate assigned will remain in the debtor, and be subject to attachment.[3] And where a deed is attested by one witness only, notice of the deed will not remedy the defect in the attestation.[4]

In California, the assignment must be in writing, subscribed by the assignor or his agent. It must be acknowledged or proved and certified in the mode prescribed by the chapter of the Code on recording transfers of real property,[5] and unless these provisions are complied with, the assignment is void against every creditor not assenting thereto.[6]

§ 248. *Oath to Assignment.*—In some of the States, it has been made necessary to the validity of an assignment, that it should be *sworn to* by the assignor. Thus, in New Hampshire, the assignor is required to make oath "that he has placed and assigned, and the true intention of his assignment is to place, in the hands of his assignee, all his property of every description, except such as is by law exempted from

[1] King v. Moore, 18 Pick. 376.
[2] Gen. Laws (ed. 1878), c. 140, p. 336, § 2.
[3] Barker v. Bean, 25 N. H. 412.
[4] Id. ibid.
[5] Civil Code, tit. 8, pt. 2, § 3458.
[6] Id. § 3459.

attachment and execution, to be divided among all his creditors in proportion to their respective claims."[1] In Massachusetts, under the statute of 1836, c. 238, the debtor was required to make oath, "that he had by such assignment conveyed all his property, not exempted by law from attachment, for the benefit of all his creditors," according to the true intent and meaning of the act.[2] In New Jersey, the debtor is required to verify his inventory by oath or affirmation.[3] In Maine, the assignor was required to make oath to the truth of the assignment, and a certificate of the fact was required to be made thereon by the magistrate administering it.[4]

In Indiana, the assignor is required to make oath before some person authorized to administer oaths, that the assignment and schedules contain a statement of all the property, rights and credits belonging to him, or of which he has any knowledge, and that he has not directly or indirectly transferred or reserved any sum of money or article of property for his own use or the benefit of any other person, and has not acknowledged a debt or confessed a judgment to any person or persons for a sum greater than was justly owing to such person or persons, or with the intention of delaying or defrauding his creditors.[5]

§ 249. *Acknowledgment of Execution.*—In New York, the statute declares that every assignment in trust for the benefit of creditors "shall be duly acknowledged before an officer authorized to take the acknowledgment of deeds." * * * "The assent of the assignee, subscribed and acknowledged by him, shall appear in writing, embraced in or at the end of or indorsed upon the assignment, before the same is recorded, and, if separate from the assignment, shall be duly acknowledged."[6]

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[1] Gen. Laws of N. H. c. 140, § 2; see Flint v. Clinton Co. 12 N. H. 430.
[2] Stat. of 1836, c. 238, § 1; supplement to Rev. Stat. p. 6.
[3] Rev. of N. J. (ed. 1878), p. 37, § 2.
[4] Rev. Stat. (ed. 1871), p. 543, § 2; see p. 32, *ante*.
[5] Stats. of Ind. (2d ed. 1870), vol. I, p. 114, § 2; R. S. of Ind. (1881), § 2663.
[6] 3 R. S. (7th ed.) p. 2276; Laws 1877, c. 466.

This requirement is mandatory, and not merely directory, and every assignment which does not comply with the statute in this respect is void.[1]

It has been held that the acknowledgment must be made by the debtor in person; that it cannot be made by his attorney, or proved through the medium of a witness.[2]

But it is now settled that an assignment executed in the name of the debtor and acknowledged by an attorney duly constituted for that purpose, is valid under the New York statute, and effectual to vest in the assignee the title to the assigned property.[3]

Where several debtors make an assignment, each must join in the acknowledgment.[4]

Where an assignment in trust for the benefit of creditors, made by a partnership firm, is executed by all the partners, the acknowledgment which the statute requires should be made by all.[5] But where there are non-resident members of a firm, they are not necessarily included in the requirement of a personal execution and acknowledgment by each of the assignors.[6]

The old rule that an assignment could not be executed by an attorney in fact, did not preclude the partners who remained, after one of their number had absconded, from executing an assignment of the assets of the firm.[7]

An acknowledgment before an officer who had no previous knowledge of the parties, and who received no more

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[1] Hardman v. Bowen, 39 N. Y. 196; s. c. 5 Abb. Pr. N. S. 332; Fairchild v. Gwinne, 16 Abb. Pr. 23; rev'g s. c. 14 Abb. Pr. 121; Britton v. Lorenz, 45 N. Y. 51; Rennie v. Bean, 24 Hun, 123. A defective acknowledgment cannot be taken advantage of in a collateral proceeding, to shield the assignee from liability as such. Randall v. Dusenbury, 39 Sup. C. R. (7 J. & S.) 177; affirmed 63 N. Y. 645.

[2] Adams v. Houghton, 3 Abb. Pr. N. S. 46.

[3] Lowenstein v. Flauraud, 82 N. Y. 494; affirming 11 Hun, 399; see also Baldwin v. Tynes, 19 Abb. Pr. 32. The statute referred to is Laws of 1860, c. 340. The present statute does not seem to differ as to this point.

[4] Cook v. Kelly, 14 Abb. Pr. 466; s. c. 12 Abb. Pr. 35.

[5] Treadwell v. Sackett, 50 Barb. 440.

[6] Darrow v. Bruff, 36 How. Pr. 479; and see Baldwin v. Tynes, 19 Abb. Pr. 32.

[7] National Bank v. Sackett, 2 Abb. Pr. N. S. 286; see Cook v. Kelly, *supra*.

evidence of their identity at the time of execution, is fatally defective, and the defect renders the assignment null and void.[1]

§ 250. In some other States, also, it is necessary that the execution of the assignment should be acknowledged or proved before some proper officer, in order to entitled it to be recorded. This is expressly required by statute in some instances,[2] and it seems to be an indispensable formality, wherever a record or registry of the assignment is necessary.

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[1] Treadwell v. Sackett, 50 Barb. 440; Jones v. Beach, 48 Id. 568.

[2] Thus, in California, the assignment is void as against creditors not assenting, unless acknowledged or proved in the manner prescribed; Civil Code, tit. 8, pt. 2, §§ 8458, 8459. In Iowa, the assignment must be acknowledged; Code of 1881, title 14, c. 7, § 2117. So in Indiana; Stats. of Ind. vol. I, p. 114, § 2; R. S. of Ind. (1881), § 2663. Kansas; Comp. L. (1881), c. 6, § 1. Missouri; Stats. of Mo. (Wagner, 1872), vol. I, c. 9, § 1; R. S. of Mo. (1879), p. 54. Michigan; see Ryerson v. Eldred, 18 Mich. 12. In Nebraska an assignment of both real and personal estate must be executed like deeds of real estate, which require acknowledgment. The record of an unacknowledged assignment is a nullity and furnishes no protection to the assignee as against the creditors of the assignor. Comp. Stats. of Neb. (1881), p. 387; Gen. Stat. 1872, c. 61, § 1; Heelan v. Hoagland, 10 Neb. 511.

CHAPTER XV.

RECORD OR REGISTRY OF THE ASSIGNMENT.

After the assignment is executed, there are certain acts which remain to be done on the parts of the assignor and assignee, and sometimes on the part of the creditors, in order to render it fully operative as a transfer, for the purposes intended by it; such as the *recording* or registry of the instrument—its *delivery* by the assignor to the assignee —its *acceptance* by the latter—the *delivery* of possession of the *property* assigned—and the *assent* of the *creditors* to the assignment. These subjects will be considered in the following chapters.

§ 251. *Record Essential.*—In some of the States, an assignment is of no validity against creditors, unless *recorded* or *registered* in some public office, within a certain time after its execution.

Thus, in Pennsylvania, by statute of March 24th, 1818, § 5,[1] an assignment is void as against creditors, unless recorded within thirty days[2] after its execution, in the county where the debtor resides.[3] This statute has been held to extend to assignments in trust for payment of particular creditors, as well as to those for payment of all.[4] It has been

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[1] Purdon's Digest (Brightley, 10th ed.), vol. I, p. 90.

[2] Where the assignee named in a deed of assignment for the benefit of creditors, declines to accept the trust, and in his stead another is appointed, the thirty days allowed by the act within which to record the deed runs from its date, and not from the time of the appointment of the new trustee. Hence, when the assignee did not record the deed of assignment until after thirty days from its execution, it was as to creditors null and void, and the fund in the hands of the assignee was liable to attachment by them. Johnson v. Herring, 46 Penn. St. 415; see Lane's Appeal, 82 Penn. St. 289.

[3] Stewart v. McMinn, 5 W. & S. 100. It is not sufficient that the deed is recorded in the county in which the property is situated. Schuylkill Bank v. Reigart, 4 Barr, 477.

[4] Englebert v. Blanjot, 2 Whart. 240; reversing the judgment in 1 Miles, 224; Murphy's Assignment, 2 Pitts. R. 271.

held, also, to comprehend instruments subsequently executed by the assignor, for the purpose of extending the provisions of the assignment to creditors not provided for by it as originally executed. Thus, where an assignment was made for the benefit of certain creditors who should release, which assignment was duly recorded, and there being a surplus in the hands of the assignee, after paying the releasing creditors, two instruments were executed under seal, by the assignors; by one of which they assigned the surplus to the same assignee, in trust, to pay the same to certain creditors who had signed a letter of license; and by the other of which they also assigned the surplus to the same assignee, in trust, to pay the same to such creditors as should release within a certain time, it was held that these instruments came within the provisions of the statute, and ought to have been recorded in conformity with it.[1]

The same statute has been held to extend to assignments made in the form of absolute conveyances, with separate declarations of trust,[2] and to all instruments of transfer for the benefit of creditors, whether in the particular form of an assignment or not. Hence, a power of attorney, if virtually an assignment, must be recorded, to make it valid against the attachment of a creditor.[3]

An assignment of numerous claims and judgments, "in payment" of certain creditors' demands, has been held to be an assignment for the benefit of creditors; and not having been recorded within thirty days, to be void as against a subsequent attaching creditor.[4]

The same statute has been held to extend to assignments of property in another State, and for the benefit of foreign creditors. Thus, where A., residing in Philadelphia, assigned to B., also residing at that place, real and personal

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[1] Flanagin v. Wetherill, 5 Whart. 280.
[2] Schuylkill Bank v. Reigart, 4 Barr, 477.
[3] Watson v. Bagaley, 12 Penn. St. 164.
[4] Wallace v. Wainwright, 87 Penn. St. 263.

estate situated in New York, in trust, to pay a creditor of A. in London, and then his creditors generally, and the assignment was not recorded according to the statute, it was held that it might be avoided by the creditors of A.[1]

But the statute has been held not to apply to assignments made directly to creditors, for their own benefit only, although with an understanding that any surplus should be accounted for to the debtor;[2] nor to judgments confessed by the debtor to a trustee for the payment of certain specified creditors;[3] nor to mortgages in trust to secure creditors.[4]

It has been further held, in Pennsylvania, that an assignment of real estate must, under the general act of March 18, 1775 (declaring all deeds and conveyances of land fraudulent and void against subsequent purchasers, unless recorded within six months after execution), be recorded in the county in which the land is situated, in order to make it valid against a subsequent purchaser from the assignor, without notice of the assignment; even though it were duly recorded in the county in which the assignor resided, in pursuance of the act of 1818.[5]

By the act of May 6, 1854, § 1, in all cases where lands and tenements have been or shall hereafter be conveyed to any person or persons in trust, for the use and benefit of others, by a deed of trust, the trustee or trustees, on request of any person interested, and at the cost of the party requesting it, shall cause the said deed to be recorded in the proper county where the lands and tenements are situate; and in case such deed be in the possession of any person other than a trustee, on request as aforesaid, and at the proper cost of the person requesting the same, it shall be the duty of such person, trustee or otherwise, to cause said deed to be recorded

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[1] Weber v. Samuel, 7 Barr, 499.

[2] Chaffee v. Risk, 24 Penn. St. 432; approved in Henderson's Appeal, 31 Penn. St. 502; see Lane's Appeal, 82 Id. 289.

[3] Guy v. McIlree, 26 Penn. St. 92.

[4] Ridgway v. Stewart, 4 Watts & Serg. 388.

[5] Dougherty v. Darrach, 15 Penn. St. 399.

in the proper county where the lands and tenements may be situate; and in case of neglect or refusal to cause such deed to be recorded, on request as aforesaid, it shall be lawful for the Court of Common Pleas of the proper county, on the petition of any person interested, setting forth the facts of the case, to issue a citation to the person or persons having such deed as aforesaid, to appear within such time as the court shall direct, and show cause why he or they refuse to cause said deeds to be recorded; and on failure to appear or to show satisfactory cause, said court shall order such persons, trustees or otherwise, to cause said deed to be recorded as aforesaid, with costs against such delinquent, which said order or decree may be enforced by attachment.[1]

But though not recorded according to the statute, the assignment will still remain valid as against a subsequent voluntary assignee;[2] and dissenting creditors can only avoid it *pro tanto*.[3]

The deed may be taken to be recorded, by any one of the creditors for whose use the conveyance was made, or any party interested in the trust.[4]

As soon as the assignment is placed by the assignor or any one interested, in the office of the recorder, the beneficial interest of creditors is completely vested.[5]

By the act of May 3, 1855,[6] assignments by non-residents, of property within the State, may be recorded in any county where such estate, real or personal, may be, and take effect from its date; provided that no *bona fide* purchaser, mort-

[1] Laws of 1854, p. 603; Purdon's Dig. (Brightley, 10th ed.) pp. 1425, 1426.

[2] Seal v. Duffey, 4 Barr, 274. Creditors, by levying on the property assigned, avoid the deed *pro tanto* only, and are not estopped from availing themselves of the first assignment, to prevent the operation of a second assignment on the property thus levied on, and included in the first assignment. Id. ibid. But an unrecorded assignment for the benefit of a single creditor is invalid against the assignee under a subsequent recorded assignment for the benefit of all the creditors. Kern v. Powell, 13 Reptr. 29; s. c. 10 Weekly Notes, No. 32.

[3] Id. ibid. And see Weber v. Samuel, 7 Barr, 499.

[4] Read v. Robinson, 6 Watts & Serg. 329.

[5] Marks' Appeal, 85 Penn. St. 231.

[6] Laws of 1855, p. 415; Purdon's Dig. (Brightly, 10th ed.) p. 92, § 8; see Philson v. Barnes, 50 Penn. St. 230.

gagee, or creditor, having a lien thereon before the recording in the same county, and not having had previous actual notice thereof, shall be affected or prejudiced.[1]

§ 252. In Connecticut, it is one of the requisites of a valid assignment, that it be lodged for record in the office of the Court of Probate for the district where the assignor or assignees or some of them reside.[2] But no time is limited by the statute within which this must be done; and if the assignment be recorded before the lien of a creditor attaches, it will prevail against it.[3] Nor is such record necessary where the parties reside in another State. Thus, where an assignment made in Ohio, the assignor and assignee both residing in that State, embraced a debt due from an incorporated company in Connecticut, but was not lodged for record in the office of any Court of Probate in Connecticut, it was held that the assignment, being valid by the laws of Ohio, was also valid in Connecticut, against the subsequent attachment of a creditor residing in Pennsylvania.[4]

§ 253. The Massachusetts statute of 1836 did not require assignments made under it to be recorded, but only notice of them to be published by advertisement.[5] This was held to have been intended as a legal notice to all creditors,[6] and to have been not inconsistent with the general provisions of law as to the registry of conveyances.[7] By the statute of 1838, the assignees are required to record the assignment in every

[1] Evans v. Dunkelberger, 8 Grant (Penn.), 134.

[2] Gen. Stat. of Conn. (Rev. 1875), p. 378, § 1. In the case of copartnerships and corporations, the assignment should be recorded in the office of the Court of Probate for the district where such copartnership or corporation had its office or principal place of business. See § 36. And where the assignment includes partnership and individual property, and the office or principal place of business of the partnership is in one district and the residence of one or more of the individual partners is in another district, it would seem that the assignment should be recorded in both districts. Coggill v. Bottsford, 29 Conn. 439.

[3] Strong v. Carrier, 17 Conn. 319.

[4] Atwood v. Protection Ins. Co., 14 Conn. 555.

[5] Stat. of 1836, c. 238, § 5.

[6] Guilford v. Childs, 22 Pick. 434; Wilde, J., Id. 435, 436; see Johnson v. Whitwell, 7 Pick. 71.

[7] Wilde, J., in Guilford v. Childs, 22 Pick. 434, 435, 436.

county in which there may be any real estate of the debtor on which it may operate.[1]

§ 254. In Vermont, it is made the duty of the assignor and assignee to file in the county clerk's office in the county where the assignment is made and the property assigned is situated, at the time of making such assignment, a true copy of the assignment and of the inventory of the property assigned, including all choses in action, and of the list of creditors to be benefited by the assignment, to remain on file for the use and inspection of all persons interested in such assignment.[2]

In Maine, the assignee was required to file an attested copy of the assignment in the probate office, within ten days after its execution.[3]

In New Jersey, the assignment must be recorded in the office of the clerk of the county where the debtor resides, after the surrogate has indorsed upon it the receipt of the bond required of the assignee.[4]

In Minnesota,[5] every assignment is void until it is filed in the office of the clerk of the district court in and for the county wherein the debtor resides, or wherein the business in reference to which the same is made, has been principally carried on. A similar statutory provision is in force in Michigan.[6]

In New Hampshire,[7] the assignee, within ten days of the execution of the assignment to him, must file a copy thereof in the probate office of the county where the debtor resides.

In Ohio,[8] it is the duty of the assignee, within ten days after the delivery of the assignment to him, and before disposing of any property so assigned, to appear before the

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[1] Stat. of 1838, c. 163, § 11; Pub. Stats. of Mass. (1882), p. 886.

[2] Act of Nov. 10, 1857; L. of 1857, p. 18, § 1; Gen. Stat. (1870), p. 454, § 8; Rev. Laws (1880), § 1888.

[3] Rev. Stats. (ed. 1871), c. 70, p. 542, § 8; see p. 82, *ante*.

[4] Rev. Stats. (ed. 1878), p. 37, § 4.

[5] Stat. of Minn. (1878), p. 544.

[6] Laws of Mich. 1879, No. 198.

[7] Gen. Laws of N. H. (1878), p. 336.

[8] R. S. of Ohio (1880), § 6335.

probate judge of the county in which the assignor resided at the time of executing the assignment, to produce the original assignment or a copy thereof, and to cause the same to be filed in the probate court.

In Virginia, all deeds of trust are declared void as to creditors, until admitted to record in the county or corporation wherein the property embraced in the deed may be,[1] provided that where the property is situated within the jurisdiction of a corporation or Hustings Court, the record shall be made in the clerk's office of such corporation or Hustings Court.

In North Carolina, a deed of trust must be proved and registered within six months, or it will be utterly void as against a creditor; and the circumstance of the registration before a creditor has got his judgment and execution, makes no difference, as notice of a deed of trust not duly registered, raises no equity against a creditor.[2] Where a creditor, knowing that another creditor has taken a deed of trust, but which is not registered, takes another deed of trust on the same property, to secure his own debt, and procures it to be first registered, this is held to be no fraud against any person, at least at law; more specially, it is not a fraud against those who do not claim under the creditor secured by the first deed.[3] In the Revised Code of this State, it is now declared that no deed of trust shall be valid at law, to pass any property, as against creditors or purchasers for a valuable consideration, but from the registration of such deeds of trust in the county where the land lies, or, in case of personal estate, where the donor resides.[4]

[1] See act of Jan. 16,1867, amending and re-enacting § 5 of c. 119, Code of 1860, p. 566; Code of 1873, p. 897; see also Blackford v. Hurst, 26 Gratt. 203; Burr's Ex'r v. McDonald, 3 Id. 215; Shanks v. Lancaster, 5 Id. 110. In Kirkland v. Brune (31 Gratt. 126), it was held that an assignment of a mere chose in action as a debt or claim on another for money due, need not be recorded, and will be good against a subsequent attachment.

[2] Dewey v. Littlejohn, 2 Ired. Eq. 495; Ruffin, C. J., Id. 503, citing Davidson v. Cowan, 1 Dev. Eq. 470.

[3] Burgin v. Burgin, 1 Ired. L. 453.

[4] Rev. Code of N. Carolina (ed. 1855), c. 27, § 22, p. 245; Battle's Rev. p. 345, § 12.

§ 255. In Alabama, an assignment must be recorded in the office of the county where the property lies, and also in the county where the grantor resides.[1] A deed of trust not delivered for registration, or recorded, until thirty-one days after its execution, has been declared void as against judgment creditors not having actual notice of the deed.[2]

In Kentucky, all deeds of trust are required to be recorded in the offices of the county courts.[3] And the practice seems to be, to record all assignments, whether of real or personal property.[4]

In California, the assignment must be recorded with the county recorder of the county in which the assignor resided at the date of the assignment, or if he did not then reside in the State, with the recorder of the county in which his principal place of business was then situated, or if he had not then a residence or place of business in the State, with the recorder of the county in which the principal part of the assigned property was then situated. If there be more than one assignor, the assignment may be recorded in the county in which any one of them resided at its date, or in which any one of them not residing in the State, had a place of business.[5] A compliance with these requirements is essential to the validity of the assignment.[6]

In Indiana, the assignment must, within ten days after its execution, be filed with the recorder of the county in which the assignor resides; and until the assignment is recorded as provided, it conveys no interest in the assigned property to the assignee.[7]

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[1] Act of January 11, 1828; Rev. Stat. (1867), §§ 1553, 1561; Cummings v. McCullough, 5 Ala. 324.

[2] Wallis v. Rhea, 12 Ala. 646.

[3] Brown & Morehead's Stat. Law, vol. I, pp. 448, 449; Session Acts of 1836, 1837, p. 255; Session Acts, 1838, 1839, p. 96; Gen. Stats. of Ky. (1881), p. 256.

[4] See Vernon v. Morton, 8 Dana, 247; Cogar v. Stewart, 78 Ky. (Rodm.) 59; Zaring v. Cox, Id. 527.

[5] Civil Code, § 3458. [6] Id. § 3459.

[7] Stats. of Indiana (ed. 1870), vol. I, p. 114, § 2; R. S. of Ind. (1881), § 2663. The title to the property, whether real or personal, does not pass to the as-

§ 256. In Iowa,[1] Kansas,[2] Maryland,[3] Mississippi,[4] Tennessee,[5] Texas,[6] Missouri,[7] and Oregon,[8] assignments and deeds of trust are required to be recorded. But the recording act of Mississippi does not embrace deeds of trust executed in other States, and a failure to record such deeds in that State after a removal of the property into it, does not impair their validity, even against *bona fide* purchasers and creditors, without notice of their existence.[9]

In Illinois, no record of an assignment of personal property was necessary where there was an actual delivery of the possession of the property.[10] But it is now provided by statute[11] that every assignment must be recorded in the county where the assignor resides, and if the assignment embraces lands, or any interest therein, it must be recorded in the county or counties in which the land is situated.

An Arkansas[12] title vests in the assignee, not only as

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signee until the assignment has been duly recorded. New v. Reissner, 56 Ind. 118; Forkner v. Shafer, Id. 120.

The assignment must be recorded in each of the counties in which real estate thereby conveyed is situated. Switzer v. Miller, 58 Ind. 561.

An assignment, which has neither been assented to by an execution creditor nor recorded, is not binding upon such creditor, even though after it was made he had verbally assented thereto, nor does any property pass until the deed has been filed or recorded. Eden v. Everson, 65 Ind. 118.

A complaint by an assignee which does not allege recording, is bad on demurrer. Foster v. Brown, 65 Ind. 234.

[1] Iowa Code (1880), tit. 14, c. 7, § 2117. But where possession accompanies the conveyance of personal property, it is not necessary that the deed should be acknowledged and recorded. Meeker v. Saunders, 6 Iowa, 61.

[2] Gen. Stats. (1868), c. 6, p. 93, § 1; Comp. Laws (1881), p. 99.

[3] See Houston v. Nowland, 7 Gill & J. 480; Brooks v. Marbury, 11 Wheat, 78; Farquharson v. Eichelberger, 15 Md. 63; Hoopes v. Knell, 31 Id. 550.

[4] Prewett v. Dobbs, 13 Sm. & M. 431.

[5] Brevard v. Neely, 2 Sneed, 164; Simpkinson v. McGee, 4 Lea (Tenn.), 432; Code of Tenn. § 2030; see Miller v. O'Bannon, 4 Lea (Tenn.), 398.

[6] Act of February 5, 1840; Paschal's Dig. vol I, p. 833; Acts of 1879, c. 58; R. S. (1879), appendix, p. 5.

[7] Stats. of Mo. (Wagner, 1872), vol. I, c. 9, § 1, p. 150; R. S. of Mo. (1879), § 354.

[8] Laws of 1878, p. 37.

[9] Palmer v. Cross, 1 Sm. & M. 48; Dobbs v. Prescott, 13 Id. 431, cited and confirmed in Presley v. Rogers, 24 Miss. 520, 524.

[10] Wilson v. Pearson, 20 Ill. 81; Meyers v. Kenzie, 26 Ill. 36.

[11] Laws of 1877, p. 116; R. S. of Ill. (Cothran, 1881), p. 118.

[12] Thatcher v. Franklin, 37 Ark. 64.

against the assignor, but also as against the execution creditors, without registration. By statute,[1] however, the assignee must not take possession, sell, or in any way manage or control the property assigned until he files the schedule and executes the bond.

In Nebraska, assignments which are not recorded in the office for the recording of deeds in the county in which the assignor resides, and in the county in which real estate so assigned is situate, within thirty days after the execution thereof, are considered null and void, as against any of the creditors of the assignor and subsequent *bona fide* purchasers without notice;[2] and the recording of an unacknowledged deed is a nullity.[3]

In New York, it is provided that every assignment made under the provisions of the act of 1877, shall be recorded in the clerk's office of the county in which the debtor resided or carried on his business at the date thereof.

An assignment by copartners must be recorded in the county where their principal place of business is situated. When real property is a part of the property assigned, and is situated in a county other than the one in which the original assignment is required to be recorded, a certified copy of such assignment must be filed and recorded in the county where such property is situated.[4] But such filing in the clerk's office is not constructive notice of the conveyance of real estate.[5] An assignment of real estate should therefore likewise be recorded in the register's office of the county where the real estate is situated. Sometimes, instead of recording the assignment itself, it has been the practice, where real estate is conveyed by it, to have a deed of the same property prepared in the ordinary form, and bearing even date, which, after being executed and acknowledged by the

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[1] R. S. of Ark. (1874), § 385.

[2] Laws of 1877, p. 26, § 7.

[3] Heelan v. Hoagland, 10 Neb. 511.

[4] Laws of 1877, c. 466, § 2; 3 Rev. Stat. (7th ed.) p. 2276; Fay's Dig. vol. I, p. 394.

[5] Simon v. Kaliske, 6 Abb. Pr. N. S. 224; s. c. 37 How. Pr. 249.

proper parties, is put on record like any other conveyance. An assignment by a non-resident should be recorded in the county where the property is situated.[1] Neglect to record the assignment does not render it fraudulent.[2] But a recording of an assignment without the written assent of the assignee, required by statute, is void against attaching creditors.[3]

§ 257. *Notice in Lieu of Record.*—The public notice of the assignment, which is usually given by the assignee on accepting the trust (and sometimes by the assignor), of which more will be said hereafter, operates in some instances with the effect of a record.[4] In Massachusetts, under the statute of 1836, c. 238, it was held that an assignment of real estate, duly notified in a newspaper, as required by the statute, was valid, as against an attaching creditor, although not recorded in the registry of deeds; and this, notwithstanding the provisions of the Revised Statutes (c. 59, § 28), as to the registry of conveyances of real estate in general.[5] In Mississippi, it was held in the case of Dixon v. Doe,[6] that creditors, equally with subsequent purchasers, were affected by notice of an unregistered deed. This case was referred to by the court in Henderson v. Downing,[7] without controverting the decision, and with no other comment than to say that it would not be extended any farther than the case there made. In North Carolina, as already mentioned, notice of a deed of trust, not duly registered, raises no equity against a creditor.[8]

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[1] Scott v. Guthrie, 10 Bosw. 408.

[2] Denzer v. Mundy, 5 Robt. 636.

[3] Rennie v. Bean, 24 Hun, 123.

[4] Van Hook v. Walton, 28 Tex. 59; citing Givens v. Taylor, 6 Id. 315; Bennett v. Cocks, 15 Id. 67.

[5] Guilford v. Childs, 22 Pick. 434.

[6] 1 Sm. & M. 70.

[7] 24 Miss. 106; Yerger, J., Id. 114, 115.

[8] Dewey v. Littlejohn, 2 Ired. Eq. 495.

CHAPTER XVI.

DELIVERY OF THE ASSIGNMENT.

§ 258. In order to complete the transfer intended by the assignment, it is necessary not only that the instrument should be executed with all the requisite formalities, but that it should be actually *delivered* to the assignee.[1]

Thus, in Pennsylvania, in a case where, among other circumstances, there was no delivery of the assignment to the assignee until several weeks after its date, the assignment was held to be fraudulent and void against a creditor who had obtained judgment.[2] And in another case in the same State, it was held to be indispensable to the effect of an assignment for the benefit of creditors, as well as of other deeds, that it should be actually delivered, or put in a course of transmission beyond the grantor's control, to the assignee; otherwise an execution would be preferred.[3] So, in Massachusetts, where an assignment purporting to be an indenture tripartite between the debtor, the assignees, and the creditors who should execute it, was executed by the debtor and assignees, and then taken by the debtor to procure its execution by his creditors, no counterpart having been made; and after some of the creditors had executed it, and before it was delivered to the trustees, another creditor attached the property assigned—the attachment was held good against the assignees, the assignment being incomplete until delivery to them.[4] In Tennessee, delivery is an essential incident to the

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[1] Van Hook v. Walton, 28 Tex. 59; Brackett v. Barney, 28 N. Y. 333.

[2] Burd v. Smith, 4 Dall. 76.

[3] McKinney v. Rhoads, 5 Watts, 345; see Klapp's Assignees v. Shirk, 18 Penn. St. 589.

[4] Marston v. Coburn, 17 Mass. 454.

proper execution of a deed of trust, as well as of all other deeds.[1]

§ 259. *What Amounts to a Delivery.*—A deposit of the deed in the post office, directed to the assignee, who resided at some distance, was held in Pennsylvania to be sufficient as against an execution which was levied between the deposit in the office and the actual delivery to the assignee.[2]

In a case in Ohio,[3] it was held that the assignment took effect from the time of placing it in the post office; for the assignor thereby ceased to have control of the property, and the assignee, by his previous conduct in preparing the assignment and sending it to the assignor, had accepted the trust. The possession of the carrier must therefore be regarded as the possession of the assignee.

In a case in Michigan,[4] the debtor assigned to a member of a firm to which he was indebted, who had previously agreed to act as assignee. The debtor delivered the assignment to an agent of the firm, who took it to the residence of the assignee. The latter was absent, but on his return accepted and set out to take possession. On the day the assignment was executed, after the agent had departed, an attachment was levied on the goods by another creditor. It was held, in view of the previous understanding and the representative character of the agent, that the assignment, being unconditional, took effect as soon as the agent started for his principal and it was beyond the assignor's control, and that it was sufficiently perfected by acceptance and delivery to defeat the levy.

The delivery of an assignment to the clerk, to be recorded, may be considered as a delivery to a stranger, for the use of the creditors, there being no condition annexed to the assignment, making it an escrow.[5] And the record of the

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[1] Brevard v. Neely, 2 Sneed, 164; McKinney, J., Id. 169.

[2] McKinney v. Rhoads, 5 Watts, 345.

[3] Johnson v. Sharp, 31 Ohio St. 611. [4] Stamp v. Case, 41 Mich. 267.

[5] Tompkins v. Wheeler, 16 Pet. 106; see Brevard v. Neely, 2 Sneed, 164. As

deed amounts to *prima facie* evidence of delivery.[1] A delivery to the trustees is equivalent to a delivery to the *cestuis que trust*.[2] In Pennsylvania, where a debtor executed an assignment in M. county, and handed it to his son to take to Philadelphia to a third person, who called with it on the assignee in that city, and desired him to take it, but he refused to have anything to do with it, it was held that a presumption arose, from the nature of the case, that the tender was made by authority of the grantor.[3]

The moment an assignment is placed by the assignor, or any one interested, in the office of the recorder of deeds, the beneficial interest of the creditors,—the *cestuis que trust*,—is completely vested, and it is totally immaterial when the assignee accepts the trust, or whether he ever accepts it.[4] In Tennessee, it is held that a delivery, to be valid, must be such as not only deprives the grantor of the power to recall the deed, but likewise such a consummation of the formalities of execution as to make the deed effectual to transfer the title.[5]

§ 260. *Evidence of Delivery.*—Where an assignment by an indenture of three parts was signed and sealed, and purported to have been delivered by the debtor, the trustees, and some of the creditors; and one part was found in the hands of the trustees, and another, several months after the date, in the hands of the creditors, and in adjusting their claims was often referred to, as well by the trustees as by the creditors; and the debtor's property passed into the hands of one of the trustees, who appeared before the creditors in the character of trustee, and made proposals to the creditors in the name of all trustees, and it was often spoken

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to delivery as an escrow, see Bowker v. Burdekin, 11 Mees. & W. 128; Johnson v. Baker, 3 B. & Ald. 440; Ward v. Lewis, 4 Pick. 518.

[1] Ingraham v. Griggs, 13 Sm. & M. 22; but see Webb v. Dean, 21 Penn. St. 29.

[2] Ingraham v. Griggs, 13 Sm. & M. 22; and see Moir v. Brown, 14 Barb. 39, 44.

[3] Read v. Robinson, 6 W. & S. 329.

[4] Marks' Appeal, 85 Penn. St. 231.

[5] McKinney, J., in Brevard v. Neely, 2 Sneed, 164, 170.

of by him as being held under the assignment, and was sold by him for the benefit of the creditors; and the debtor, when he requested one of his creditors to execute the indenture, informed such creditor that he had assigned his property for the benefit of his creditors—it was held, in Massachusetts, that this was sufficient evidence of a delivery of the deed by the debtor to the trustees, and to the creditors.[1]

A subsequent fraudulent sale by an assignee has no bearing upon the question of the delivery of the assignment.[2]

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[1] Ward v. Lewis, 4 Pick. 518. See the New York case of Moir v. Brown (14 Barb. 39), where the evidence showed that the assignment was not delivered to one of the assignees, until after a levy of execution on the property assigned.

[2] Leeds v. Commonwealth, 83 Penn. St. 453.

CHAPTER XVII.

AMENDMENTS AND ADDITIONS TO ASSIGNMENTS.

After an assignment has been executed, it may be corrected and amended, if necessary, by the consent of all the parties, or on application to a court of equity.

§ 261. *By Consent of Parties.*—It may be amended by the consent of parties, so as to purge it of any objectionable features. And where creditors have become parties by actually assenting to the assignment, or where their assent is assumed, their consent to any alteration or modification of the assignment is essential. When the deed is fraudulent, there is no presumption of an assent to it on the part of the creditors,[1] and it has been held that such a conveyance is revocable until all the creditors have assented, and may be canceled, abrogated, or modified at pleasure by those who are parties to it.[2] In Illinois, where the assignment was fraudulent because it empowered the assignee to sell on credit, a subsequent agreement entered into between the assignor and assignee, excluding the objectionable power, was held to purge the instrument of fraud, no rights of creditors having attached.[3] And in another case in the same State, it was held that if an assignment be so modified, by the consent of all the parties, prior to the time when any creditor is in a position to attack it, it becomes a valid assignment, and

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[1] See *post*, Chap. XX.

[2] Insurance Co. v. Wallis, 28 Md. 173.

[3] Pierce v. Brewster, 32 Ill. 268. The rule in Illinois seems to follow the English doctrine. (See *ante*, § 125.) The assent of creditors is not assumed, even where the instrument is beneficial; they are not regarded as parties to it, therefore, unless they were privy to its execution, or have actually assented. Mr. Justice Walker, in Gibson v. Rees (50 Ill. 383), after citing Wilson v. Pearson (20 Id. 81) and Pierce v. Brewster (32 Id. 268), and English cases, remarks: "These authorities abundantly establish the doctrine, that where such a deed is made, and the creditors are not parties to it, it may, under proper limitations, be altered, changed, or canceled by the parties to the instrument."

the rights of creditors, in respect to the property assigned, must be governed by it.[1]

But in a later case,[2] it has been held that where a debtor has executed and delivered the deed to the assignee, the assignor has no power afterward to change its terms and conditions without the consent of the assignee and the creditors.

After the execution and delivery of an assignment, a schedule (previously omitted) may be annexed to it, by the consent of all the parties, and it may then be redelivered with the same effect as before.[3]

In a case in Georgia,[4] where the debtor had provided in the assignment for a release, and subsequently relinquished any benefit he might be supposed to have reserved to himself therefrom, it was held that after the execution of such a relinquishment and its acceptance by the assignee, before the plaintiffs obtained judgment, the assignment would stand.

In California, it is provided by statute that an assignment for the benefit of creditors, which has been executed and recorded so as to transfer the property to the assignee, cannot afterwards be canceled or modified by the parties thereto without the consent of every creditor affected thereby.[5]

§ 262. *By the Court.*—Mistakes in assignments will also sometimes be corrected, and the instruments be reformed by a court of equity, in the absence of any express statute provision to the contrary, on application for that purpose. In a case in Alabama, where a debtor executed a deed of trust to secure certain of his creditors and sureties, and included in it certain notes on which one of the beneficiaries was supposed to be bound as surety, describing them as notes on which said beneficiary was security, under the belief that if he was not bound, the misdescription would exclude the holder of them from any benefit under the deed—the deed

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[1] Conkling v. Carson, 11 Ill. 503.
[2] Union Nat. Bank v. Bank of Commerce, 94 Ill. 27.
[3] Clap v. Smith, 16 Pick. 247; Hand, J., in Moir v. Brown, 14 Barb. 39, 48.
[4] Cohen v. Summers, 54 Ga. 501.
[5] Civil Code, § 3473; Hitt. 3473.

was reformed in equity, upon proof of the mistake, and that the grantor intended to secure the said beneficiary only, and not the notes.[1] But in a case in Connecticut, the Supreme Court of Errors refused to reform an assignment, so as to include a claim which was intended and agreed by the assignor to be included in it and conveyed to the assignee, but had been, through the mistake of the draftsman, omitted; on the ground that, as the statute of 1828, against fraudulent conveyances, expressly required the assignment to be in writing and lodged for record in the probate office, the ordinary principles which are adopted in chancery, as to the correction and reformation of mistakes in instruments, did not apply to the case.[2] And in a later case, the same court adhered to the former decision, with the distinction that, as to the assignor, if it should become necessary to reform the assignment in consequence of a mistake attending its execution, the ordinary principles on which such relief is granted by courts of equity would apply. But such relief would not be granted against his creditors, for the obvious reason that, as to them, the instrument was rendered fraudulent and void.[3]

§ 263. *In other Cases.*—Sometimes the effect of amendment has been allowed to be obtained by the mere act of the assignor, by means of a new and distinct instrument. Thus, in Connecticut, it has been held that an instrument referring to a former deed of trust, which was void by reason of a clause prescribing terms to the *cestui que trust*, renewing and confirming such deed, exclusive of the exceptionable clause, and assigning the same property for the same purpose, and giving the same authority to the trustee, not by a specification of such property, but by terms of reference to the former deed, might have effect as a new and independent instrument of conveyance.[4] In a late case in Vermont, where an

[1] Trapp v. Moore, 21 Ala. 693; see Moale v. Buchanan, 11 Gill & J. (Md.) 314.

[2] Whitaker v. Gavit, 18 Conn. 522.

[3] Whitaker v. Williams, 20 Conn. 98; Storrs, J., Id. 102; see Farrow v. Hayes, 51 Md. 498.

[4] Ingraham v. Wheeler, 6 Conn. 277. As to the revocation and canceling of assignments, see *post*, Chap. XXVII.

assignment was defective on account of its containing a resulting trust before providing for all the assignor's creditors, it was held by the Supreme Court that the defect might be supplied by a new assignment providing in terms for the payment of all the assignor's debts. The court (Redfield, Ch. J.) said this was not only allowable, but it was certainly commendable; and they saw no reason why it might not be done by a mere declaration of trust in favor of all the creditors, in addition to the former assignment, without making the whole paper anew.[1] It was also held in the same case, that where an assignment was voidable or inoperative, as to creditors, under the statute, on account of its generality, the defect might be cured by a new assignment, excepting some substantial portion of the estate and leaving it open to attachment.[2] But in a case in the Court of Appeals of New York, where an assignment was invalid by reason of its containing an authority to the assignee to sell the assigned property on credit, it was held that it could not be made valid by any new instrument directing the property to be sold for cash only, executed by the assignor after the assignee had accepted the assignment and taken possession of the assigned property. By the assignment, the assignor had divested himself of all control over the property; and he could neither revoke nor alter it, to the prejudice of a creditor whose lien on the property had already attached.[3]

The insertion of a provision of the assignment, that schedules may be corrected, if necessary, has already been noticed.[4]

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[1] Merrill v. Englesby, 28 Vt. 150, 155, 156. [2] Id. ibid.

[3] Porter v. Williams, 9 N. Y. 142; Willard, J., Id. 152. And the same rule was applied where the assignment was invalid by reason of a provision unlawfully exempting the assignee from liability. Metcalf v. Van Brunt, 37 Barb. 621; and see Gates v. Andrews, 37 N. Y. 657; Haines v. Campbell, 8 Wis. 187. But when the instrument is void by statute, and not merely voidable, no title vests in the assignee, and the assignor may therefore convey the property, by a proper instrument, to the assignee or to a third party. Juliand v. Rathbone, 39 N. Y. 369; and see Brahe v. Eldridge, 17 Wis. 184.

In a special term case in New York, it is held that an assignment cannot be amended, even by order of court, although the schedules may be. Matter of Wilson, 1 Monthly L. Bul. 5.

[4] See *ante*, § 151. Dedham Bank v. Richards, 2 Metc. 105; Halsey v. Whitney, 4 Mason, 206.

§ 264. *Additions.*—In regard to *additions* to assignments, it has been held that a subsequent additional assignment, to be valid, must be made with the consent of all the parties to the instrument.[1] The rights of creditors are fixed by the assignment, and without their knowledge or consent cannot be varied by any subsequent act of the assignor or assignee. Thus, in a case in New York, it was held that no subsequent agreement by the assignees, to apply a portion of the property for any other purpose than that specified by the assignment, could be upheld.[2] And in a case in Maine, it was held that an instrument discharging such creditors as should have become parties to an assignment, from the effect of their release to the debtor contained therein, would not defeat an assignment made for the benefit of creditors *pro rata*, as to creditors who had not become parties.[3] But the operation of an assignment may be extended by a new deed; as where it directs the appropriation of a surplus in the hands of the assignee, not appropriated by the first deed.[4] And supplemental assignments are frequently made, in order to include property not comprised in the first instrument, or to pass a more perfect title to the property already assigned.[5]

The filing of a supplemental assignment containing property unintentionally omitted from the original assignment, does not carry forward the date of its taking effect.[6]

A subsequent assignment may be made by one of two partners, for the purpose of correcting the first.[7]

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[1] Ramsdell v. Sigerson, 2 Gilm. 78.

[2] Bell v. Holford, 1 Duer, 58, 78. [3] Howe v. Newbegin, 34 Me. 15.

[4] Flanagin v. Wetherill, 5 Whart. 280. In this case there were two additional instruments executed by the assignors, by which they assigned the surplus to the same assignee, for different purposes.

[5] See Conkling v. Coonrod, 6 Ohio St. 611; Metcalf v. Van Brunt, 37 Barb. 621.

[6] Krug v. McGilliard, 76 Ind. 28.

[7] Rumery v. McCulloch, 11 Am. L. Rec. 17 (Wis.).

CHAPTER XVIII.

ACCEPTANCE BY THE ASSIGNEE.

In order to give the assignment validity, and render it operative, it is essential that there should be an *acceptance* of the instrument, and of the trust created by it, on the part of the assignee; a delivery of the instrument without acceptance, is nugatory.[1]

§ 265. *When and How to be Signified.*—The acceptance should be signified by the assignee immediately on the delivery of the assignment; otherwise creditors may gain a priority, which will not be divested. Where an assignee delayed an express acceptance of the trust, but received the deed, and executions came to the sheriff's hands, it was held that the assignee's subsequent acceptance could not deprive the creditors of their priority.[2]

The acceptance must be actually signified by the assignee; the mere taking the instrument into his hands, and retaining it, amounts to nothing.[3] It may be signified verb-

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[1] Crosby v. Hillyer, 24 Wend. 280; Lawrence v. Davis, 3 McLean, 177; Pierson v. Manning, 2 Mich. 446; Pratt, J., Id. 462. Both the appointment and the acceptance of the trust are necessary to make one an assignee, and when these are denied they are facts to be proved. Dougherty v. Bethune, 7 Ga. 90. The fact that an act of the legislature recites the assignment to a certain person and confirms it, does not constitute him an assignee without his acceptance. Bethune v. Dougherty, 21 Ga. 257.

But in the case of Furman v. Fisher, 4 Cold. (Tenn.) 626, Mr. Justice Shackelford expressed a contrary opinion. "The assent of the trustee," he observes, "is not necessary to the validity of a trust deed. He may refuse to act, be unable to comply with the statutes, or die, and in such or similar cases, a court of chancery will execute it." So where the clerk of the court was named as assignee, but was incompetent to act, it was held that this in no way affected the validity of the deed. Barcroft v. Snodgrass, 1 Cold. (Tenn.) 430.

[2] Crosby v. Hillyer, 24 Wend. 280; see Pierson v. Manning, 2 Mich. 44; Siggers v. Evans, 32 Eng. Law & Eq. 139.

[3] Nelson, C. J., in Crosby v. Hillyer, 24 Wend. 284. In Wisconsin, the assignee is required to indorse his acceptance upon the assignment filed with the clerk. R. S. of Wis. (1878), § 1696. The names of the assignees may be affixed

ally; but it is sometimes expressed by the assignee's signing and sealing a written acceptance appended to the assignment. Such an acceptance is decisive evidence against him.[1] Entering into possession of the property assigned,[2] or the qualifying of the assignee,[3] operates as an acceptance of the trust. An assignee having previously agreed to accept can accept by an agent.[4]

When an assignment is made to two, and one accepts and the other refuses the trust, the assignment is operative as to the assenting trustee, unless there be a condition that it shall be void, if both trustees do not assent.[5]

In New York the assent of the assignee, subscribed and acknowledged by him, must appear in writing embraced in or at the end of or indorsed upon the assignment.[6] After acceptance, the assignees cannot be relieved of the duties and responsibilities of their office except by the order of a court of competent jurisdiction.[7] The provisions of the statute being mandatory, an assignment recorded without the assent of the assignee subscribed and indorsed by him thereon, though he may have orally agreed to act, is void against creditors claiming under attachments against the property of the assignor.[8]

§ 266. *Effect of Acceptance.*—By the acceptance of an assignment for the benefit of creditors, the assignee becomes a trustee for the creditors, and equity will compel the execu-

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in their presence and at their request. Scott v. Seaver, 52 Wis. 175. The mere fact that the assignee has failed to affix his certificate required by R. S. § 1697, does not invalidate the assignment. Steinlein v. Halstead, 52 Wis. 289.

[1] Mead v. Phillips, 1 Sandf. Ch. 83, 85.

[2] Price v. Parker, 11 Iowa, 144.

[3] Shyer v. Lockhard, 2 Tenn. Ch. (Cooper), 865. The bringing and prosecuting a suit to a final decree furnish conclusive evidence of the acceptance of the trust by a trustee in insolvency. Taylor v. Atwood, 47 Conn. 498.

[4] Stamp v. Case, 41 Mich. 267; see *ante* p. 376.

[5] Gordon v. Coolidge, 1 Sum. 537; see King v. Donnelly, 5 Paige, 46; Moir v. Brown, 14 Barb. 39, and cases cited by Hand, J., Id. 45; Matter of Stevenson, 3 Paige, 420.

[6] 3 R. S. (7th ed.) p. 2276.

[7] Brennan v. Wilson, 71 N. Y. 502; s. c. 4 Abb. N. C. 279.

[8] Rennie v. Bean, 24 Hun, 123.

tion of the trust for their benefit.[1] An assignment, once accepted by the assignee, is vested for the benefit of creditors, and a subsequent renunciation does not affect the validity of the conveyance.[2] But an acceptance by an assignee who is a creditor, has been held not to bind other creditors, in the case of a fraudulent assignment.[3]

Where one accepts a trust by which a debtor devotes all his property to the payment of his creditors, the trustee thereby waives any specific lien he may have on the property by virtue of execution, and must take according to the stipulations of the deed of trust.[4]

§ 267. *Presumed Acceptance.*—The assent of the trustees is presumed, until the contrary be shown; and if the assignment be made without their knowledge, they may, when it comes to their knowledge, affirm it, and it will be binding.[5] Where the trustee is not present his assent may be presumed, for the purpose of giving operation to the deed.[6]

§ 268. *Proceedings Where Trustee Refuses to Accept.*—If the person named in the assignment as assignee or trustee refuse to accept the trust, the execution of the trust devolves upon the court of equity having jurisdiction, which may appoint one or more new trustees, if necessary.[7]

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[1] Moses v. Murgatroyd, 1 Johns. Ch. 119; Shepherd v. McEvers, 4 Id. 136; Nicoll v. Mumford, Id. 523; Ward v. Lewis, 4 Pick. 518; New England Bank v. Lewis, 8 Id. 113; Pingree v. Comstock, 18 Id. 46; Weir v. Tannehille, 2 Yerg. 57; Robertson v. Sublett, 6 Humph. 313; Pearson v. Rockhill, 4 B. Mon. 296; Furman v. Fisher, 4 Cold. (Tenn.) 626; Barcroft v. Snodgrass, 1 Id. 430; Thatcher v. Franklin, 37 Ark. 64.

[2] Seal v. Duffy, 4 Barr, 274; see Brooks v. Marbury, 11 Wheat. 78; Curtis, J., in Stewart v. Spencer, 1 Curt. 157, 166; McKinney, J., in Brevard v. Neely, 2 Sneed, 164, 170; Bethune v. Dougherty, 30 Ga. 770.

[3] Cook v. Smith, 3 Sandf. Ch. 333.

[4] Harrison v. Mock, 10 Ala. 185. As to the effect of an acceptance by an assignee who is also a creditor, see King v. Moore, 18 Pick. 376; Harrison v. Mock, 16 Ala. 616.

[5] Galt v. Dibrell, 10 Yerg. 146; Nicholl v. Mumford, 4 Johns. Ch. 522, 529; Brown v. Minturn, 2 Gall. 557; Small v. Marwood, 9 B. & Cress. 300; Smith v. Wheeler, 1 Vent. 128; Marbury v. Brooks, 7 Wheat. 556; Weston v. Barker, 12 Johns. 276; 2 Kent's Com. [533] 692, note.

[6] 1 Am. Lead. Cases, 96; McKinney, J., in Brevard v. Neely, 2 Sneed, 164, 170.

[7] King v. Donnelly, 5 Paige, 46. From what was said by the court in Seal v. Duffy (4 Barr, 274, 277, Bell, J.), it would appear that as the legal title does not pass until acceptance, it remains in the assignor, or at least, becomes revested

In Virginia, the general rule of equity is recognized, that a trust shall never fail for want of a trustee; and therefore, if the trustee dies or refuses to accept the trust, or is incapable of performing it, a court of equity will give to the *cestuis que trust* the proper relief, either by executing the trust, or appointing a trustee for that purpose.[1] The same rule is recognized in Georgia,[2] Pennsylvania,[3] Kentucky,[4] Tennessee,[5] and South Carolina.[6] But in a case in Virginia, where a debtor had conveyed a large property, real and personal, in trust to secure numerous creditors; and the trustees, not having signed the deed, refused to act; and two of the creditors filed a bill on behalf of themselves and the other creditors secured by the deed, against the grantor and the trustees, praying for the appointment of other trustees, which prayer was granted, it was held by the court to be error simply to appoint trustees in the place of those named in the deed; but that the court should have the trust administered under its own supervision and control; and

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in him by way of remitter; so that he may select a new assignee, and assign the property to him. But where interests of creditors have in the meantime attached, it has been held in Pennsylvania, that a refusal, from the beginning, of a named assignee, to accept the trust, would not operate to divest these intermediate interests. See Read v. Robinson (6 W. & S. 329, 332); approved by the court in Seal v. Duffy, *ubi supra*. And in a case in the same State, where an assignment of all the debtor's estate had been executed and recorded, but the assignees never acted nor were others appointed in their stead, and there was no evidence of the delivery of the assignment to either of them, it was held that, though an assignment of real estate for the benefit of creditors, passes the legal title, which is not defeated by the refusal or neglect of the assignees to act, but vests in those whom the court appoint to execute the trust, yet that a trust results to the debtor by operation of law, which entitles him to the possession of the property remaining unconverted. Webb v. Dean, 21 Penn. St. 29; Woodward, J., Id. 32.

[1] Reynolds v. The Bank of Virginia, 6 Gratt. 174.

[2] Dawson v. Dawson, Rice's Ch. 243.

[3] Webb v. Dean, 21 Penn. St. 29. In Marks' Appeal (85 Penn. St. 231), it is held that an assignment vests title forthwith in the assignee; and it is immaterial when the assignee accepts the trust, or whether he ever accepts it.

[4] Harris v. Rucker, 13 B. Mon. 564.

[5] Field v. Arrowsmith, 3 Humph. 442; Brevard v. Neely, 2 Sneed, 164. "The acceptance of the assignment is necessary to constitute the assignee a trustee for the creditors; but it may be valid though he refuse to accept. If made for the benefit of creditors, the assent of the trustee is not essential to its validity; and a court of equity, on behalf of the creditors, will enforce the execution of the trust." McKinney, J., Id. 171; Furman v. Fisher, 4 Cold. (Tenn.) 626; Barcroft v. Snodgrass, 1 Id. 430; see Young v. Cardwell, 6 Lea (Tenn.), 168; Nailer v. Young, 7 Id. 785.

[6] Brooks v. Brooks, 12 S. Ca. 422.

that the proper course would have been to appoint commissioners to sell, and administer the trust, under the supervision and control of the court.[1]

In Connecticut, if the trustee or trustees neglect or refuse to accept the trust, after being notified, it is made the duty of the Court of Probate to appoint one or more trustees in his or their stead.[2]

§ 269. *Proceedings where Assignee Renounces after Acceptance.*—After once accepting the assignment, for the purposes of the trust, the assignee cannot divest himself of the legal estate (which by the acceptance became vested in him), by a mere refusal to carry the trust into execution, or withdraw from its support, without the consent of all the parties interested.[3] He is not permitted to defeat the trust in this way, by his own act; and if he does so renounce, or refuse to act under the assignment, it is competent to any of the parties interested in it, to call upon the proper court to appoint another assignee in his place.[4] Such a refusal vests no right in the assignor to execute another distinct conveyance of the same property to another assignee, though substantially on the same trusts.[5] Nor can the assignor appoint a new assignee, even in pursuance of a power reserved in the assignment itself.[6]

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[1] Reynolds v. The Bank of Virginia, 6 Gratt. 174. The reasons of this decision are given by Baldwin, J., Id. 179, 186. The deed in this case was one of that class, which has been before noticed, combining the qualities of a security to creditors with that of a provision for their payment, or, in other words, a mortgage in trust; and the court held that it should have been treated as a mortgage, and commissioners appointed as in cases of that kind.

[2] Gen. Stats. (Rev. of 1875), tit. 13, c. 11, § 13, p. 381.

[3] Lewin on Trusts, 464; Jones v. Stockett, 2 Bland, 409; see Strong v. Willis, 8 Fla. 124; Bethune v. Dougherty, 30 Ga. 770. This is the general doctrine in regard to trustees. Mr. Perry, in his work on Trusts (vol. II, p. 558), says: "A mere relinquishment of the trust or of the property, which does not purport to convey the property to some person authorized to receive it, does not discharge the trust," citing Dick v. Pitchford, 1 Dev. & Bat. Eq. 480; Richardson v. Cole, 2 Swan, 100; Diefendorf v. Spraker, 10 N. Y. 246; Waugh v. Wyche, 23 L. J. Ch. 333; Thatcher v. Candee, 3 Keyes, 157; Webster v. Vanderventer, 6 Gray, 429; Gilchrist v. Stevenson, 9 Barb. 9.

[4] Seal v. Duffy, 4 Barr, 274; Bell, J., Id. 278; see Dawson v. Dawson, Rice's Ch. 243; Shyer v. Lockhard, 2 Tenn. Ch. (Cooper), 365.

[5] Seal v. Duffy, 4 Barr, 274.

[6] See Planck v. Schermerhorn, 3 Barb. Ch. 644.

CHAPTER XIX.

DELIVERY OF POSSESSION OF THE PROPERTY ASSIGNED.

The acceptance of the assignment by the assignee, after its execution and delivery by the assignor, completes the proceedings necessary to the transfer, between those parties, so far as the instrument itself is concerned; but there usually remains a very important act to be done, with reference to the *property* conveyed by it, and which it is now proposed to consider; namely, the *delivery of possession.*[1]

§ 270. *When Essential.*—In order to complete the transfer of the property intended to be conveyed by the assignment, and to give it every quality of validity as against creditors, the execution or delivery of the instrument should be accompanied, or at least followed, as soon as practicable, by delivery of *possession* of the property itself to the assignee. This is particularly desirable in regard to *personal* property; the real estate assigned passing by mere delivery of the deed.[2] As it is, however, sometimes the practice for the assignor to retain possession after the assignment, and even to stipulate for such a privilege in the deed itself, it becomes an important consideration, how far a change of possession is actually essential to the validity of the conveyance, and what is the effect upon the assignment of withholding it.

The general question, whether the retention of possession by a vendor or assignor of goods sold or assigned, is fraudulent *per se*, or only presumptive evidence of fraud, and sus-

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[1] In connection with the subject of this chapter, see *post*, Chap. XXX.

[2] Marshall, C. J., in Brashear v. West, 7 Pet. 608, 613; and see Phettiplace v. Sayles, 4 Mason, 312, 321; and the argument in Tompkins v. Wheeler, 16 Pet. 106, 112; Hempstead v. Johnson, 18 Ark. 123; Wooten v. Clark, 28 Miss. 75; Noble v. Coleman, 18 Ala. 77; Seuter v. Turner, 10 Iowa, 517. See Bump on Fraud. Conv. p. 161.

ceptible of explanation; or, in other words, whether fraud in such a case is an inference of *law* to be drawn by the court, and resulting inevitably from the fact, or an inference of *fact* to be drawn by a jury—has been the subject of much discussion and numerous adjudications in the courts, both in England and the United States. The question has been justly termed "a very vexatious one,"[1] the decisions in both countries being marked by much fluctuation and diversity, and the preponderance of authority inclining at one time in favor of the stern rule of fraud in law, and at another in favor of the laxer rule of presumptive fraud. It is not within the scope of this work to take even a summary view of these decisions;[2] but only to notice the rules which they have tended to establish in this country, so far as relates to the particular subject under consideration.

§ 271. *The Different Rules that Prevail.*—In regard then to the necessity of the delivery of possession of personal property assigned, three different rules appear to have been at different times established in the United States, by decision or statute: first, that such delivery is *indispensable* to the validity of the assignment, and the want of it is *conclusive* evidence of fraud; second, that the want of possession is only *presumptive* evidence of fraud, and may be explained so as to be consistent with the validity of the transfer; and third, that non-delivery of possession is *not even presumptive* evidence of fraud, but is entirely consistent with the validity and operation of the deed, until the sale of the property assigned.

§ 272. *Delivery Indispensable.*—The first and most rigid of these rules formerly prevailed in the State of Pennsylvania; where the delivery of possession of personal property

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[1] 2 Kent's Com. [515] 664.

[2] They may be found fully collected and ably commented on in 2 Kent's Com. [515–532] 664–688. And see 1 Smith's Lead. Cas. (Am. ed. 1852). Note to Twyne's case [9–14 c.] 39–46; and the very complete and elaborate note by the American editors, Id. [47–85, ed. 1855] 46–80. See also Bump on Fraud. Conv. chaps. V and VI.

assigned was held to be essential to the validity of the assignment; and the retention of possession by the assignor was conclusive evidence of fraud, or was fraudulent *per se*, as against creditors. This was the doctrine established in the cases of Dawes v. Cope,[1] and Hower v. Geesaman.[2] In the latter case, an assignment in trust for creditors was held void as against a judgment creditor, because the grantor retained possession, and held, used, and disposed of the property as his own, although the creditor had notice of the assignment. Mr. Justice Todd, who delivered the opinion of the court, declared that, to make such an assignment valid in any case, the possession must accompany and follow the transfer. This, he asserted, was settled, if anything could be settled by precedents.[3] In Carpenter v. Mayer,[4] the same doctrine was sustained, the court holding that the continuance of possession, of an assignor of goods, was a fraud in law, and was a question for the court, and not for the jury. In Young v. McClure,[5] it was further held that there must be not only a delivery of the thing to the assignee at the time of the transfer, but a continuing possession; and that must be shown by the claimant. The question, in such cases, it was said, ought not to be left to the jury, whether the transfer is in good faith, and without design to cover the property, or to delay or hinder creditors; but it is a question of fraud in law for the court.[6]

The rule thus established, however, had been so far relaxed by the statute of June 14, 1836,[7] and the construction

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[1] 4 Binn. 258.

[2] 17 Serg. & Rawle, 251.

[3] See Clow v. Woods, 5 Serg. & Rawle, 275–278; Cunningham v. Neville, 10 Id. 201; Babb v. Clemson, Id. 419; Martin v. Mathiot, 14 Id. 214. A reasonable time, however, will be allowed the assignee to take possession. Wilt v. Franklin, 1 Binn. 502.

[4] 5 Watts, 483.

[5] 2 Watts & Serg. 147, 150.

[6] And see McBride v. Clelland, 6 Watts & Serg. 94.

[7] This statute makes it the duty of the assignee or assignees, within thirty days after the execution of the assignment, to file in the office of the prothonotary of the Court of Common Pleas of the county in which the assignor shall reside, an inventory or schedule of the estate or effects assigned, accompanied with an affidavit by such assignee, that it is a full and complete inventory. Purdon's Dig. (Brightley, 10th ed.) p. 92, pl. 9.

given to it, that an assignee, under a voluntary deed of assignment for the benefit of creditors, might suffer the goods to remain in possession of the assignor for thirty days, without subjecting them to an execution of a creditor of the assignor; such delay being given to afford time to comply with the requisitions of the statute.[1] And later decisions have now established a rule directly the reverse of that which was formerly so repeatedly considered as settled. Thus, in Fitler v. Maitland,[2] it was held to be not fraudulent for the assignor to retain possession of the property assigned, when the assignment has been recorded, and the other requisitions of law complied with. And in the latter case of Klapp's Assignees v. Shirk,[3] the doctrine is laid down, that a voluntary assignment for the benefit of creditors, in the manner authorized by law, is not avoided by the property being left in the possession of the assignor; that, to avoid the deed, the fraud must be in the assignment itself; that, on delivery of the deed, the property in the goods vests in the assignee for the benefit of creditors, and no subsequent fraudulent dealing between the assignor and assignee, can reinvest the goods in the assignor, or render them liable to levy as his property.

In Vermont, where the rule has always been maintained that an absolute sale of personal chattels, unaccompanied by possession, is fraudulent *per se*, as against the creditors of the vendor;[4] the same strict rule has been applied to assignments for the benefit of creditors. In Hall v. Parsons,[5] it was held that the same change of possession which was re-

[1] 2 Kent's Com. [522] 673, note e.

[2] 5 Watts & Serg. 307. See Dallam v. Fitler, 6 Id. 323; Mitchell v. Willock, 2 Id. 253; Mackintosh v. Corner, 33 Ind. 598.

[3] 18 Penn. St. 589. See also Dunlap v. Bournonville, 26 Penn. St. 72; Milne v. Henry, 40 Id. 352; and see 1 Smith's Lead. Cas. (Hare & Wallace's Notes, ed. 1855), 72-76.

[4] See Boardman v. Keeler, 1 Aiken, 158; Mott v. McNeil, Id. 162; Weeks v. Wead, 2 Id. 64; Beattie v. Robins, 2 Vt. 181; Judd v. Langdon, 5 Id. 231; Farnsworth v. Shepard, 6 Id. 521; Wilson v. Hooper, 12 Id. 653; Mills v. Warner, 19 Id. 609; Walworth v. Readsboro, 24 Id. 252.

[5] 17 Vt. 271. The assignment in this case was made before the act of 1843; and see Rogers v. Vail, 16 Vt. 327.

quired in case of the sale of personal property, was required where personal property was assigned for the benefit of the assignee as creditor of the assignor, and, after payment of his claims, for the benefit of the creditors generally.[1] In Illinois, also, it appears to be the rule, that *all* conveyances of goods and chattels, where the possession is permitted to remain with the donor or vendor, are fraudulent *per se*, and void as to creditors; though an exception is made where the retention of possession is consistent with the deed.[2] And in South Carolina, it has been held that leaving property assigned, in the hands of the debtor, raises the presumption of a secret trust between the debtor and the preferred creditor, and the deed is void, so far as the rights of creditors are affected. The law, in such a case, raises the conclusion of fraud, incapable of being rebutted or explained.[3]

In a case in Maryland,[4] where the assignment provided for the retention by the grantor of all his real estate and household goods and certain other property, and that he should pay rent to the trustee, it was held to be absolutely void as to the creditors of the grantor.

§ 273. *Possession Prima Facie Evidence.*—Another rule in regard to the possession of assigned property is, that possession by an assignor, after a transfer of personal property, is only *evidence* of fraud, and not fraud *per se*, or such a circumstance as, of itself, necessarily invalidates the transfer; or in other words, that it is only *prima facie* and not conclusive evidence of fraud; and that it may always be explained, so as to show the transfer to have been *bona fide*,

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[1] See Rice v. Courtis, 32 Vt. 460; Hanford v. Paine, Id. 442; see 1 Smith's Lead. Cas. (Hare & Wallace's Notes, ed. 1855), 78, 79.

[2] Thornton v. Davenport, 1 Scam. 296; Rhines v. Phelps, 3 Gilm. 455; see 1 Smith's Lead. Cas. (Hare & Wallace's Notes), 55; Dexter v. Parkins, 22 Ill. 143; Ketchum v. Watson, 24 Id. 591; Bay v. Cook, 31 Id. 336; Corgan v. Frew, 39 Id. 31; Wilson v. Pearson, 20 Id. 81; Green v. Van Buskirk, 38 How. Pr. 52.

[3] Anderson v. Fuller, 1 McMul. Eq. 27, citing Smith v. Henry, 1 Hill, 22; see 2 Kent's Com. [522] 672, note c; 1 Smith's Lead. Cas. (Hare & Wallace's Notes), 65–67; Terry v. Belcher, 1 Bailey, 568; Smith v. Henry, 2 Id. 118; Kennedy v. Rose, 2 Mills, 125; De Brodleben v. Beekman, 1 Dessau. 346.

[4] Price v. Pitzer, 44 Md. 521.

and upon sufficient consideration. This is the established rule in Massachusetts,[1] Connecticut,[2] New York,[3] North Carolina,[4] Indiana,[5] and Arkansas;[6] and appears to prevail also in Maine,[7] New Hampshire,[8] New Jersey,[9] Ohio,[10] Missouri,[11] Kentucky,[12] Tennessee,[13] Virginia,[14] Georgia,[15] Alabama,[16]

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[1] Boyden v. Moore, 11 Pick. 362; Macomber v. Parker, 14 Pick. 497; Fletcher v. Willard, 14 Id. 464; Allen v. Wheeler, 4 Gray, 123.

[2] Ingraham v. Wheeler, 6 Conn. 277; Osborn v. Tuller, 14 Id. 530; Strong v. Carrier, 17 Id. 319; see Kirtland v. Snow, 20 Id. 23; 1 Smith's Lead. Cas. 76, 77 (Am. ed. 1855).

[3] See *post*, p. 395.

[4] Dewey v. Littlejohn, 2 Ired. Eq. 495; Hardy v. Skinner, 9 Ired. L. 191; but see Gaither v. Mumford, 1 N. C. Term R. 167.

[5] Caldwell v. Rose, 1 Smith, 190; Hall v. Wheeler, 13 Ind. 371; Kane v. Drake, 27 Id. 29. In this State, as in Illinois, even a joint possession by the assignor and assignee is evidence of fraud, unless explained. Id. ibid.; Caldwell v. Williams, 1 Ind. 405; and see 1 Smith's Lead. Cas. (Am. ed. 1852), 56; Id. (ed. 1855), 57.

[6] Field v. Simco, 2 Eng. 269; Cocke v. Chapman, Id. 197; Stone v. Waggoner, 3 Id. 204; George v. Norris, 23 Ark. 121; Danley v. Rector, 5 Id. 224; Hempstead v. Johnson, 8 Id. 123.

[7] The decisions in this State, and those which follow, are mostly in cases of sales and mortgages. Reed v. Jewett, 5 Greenl. 96; Holbrook v. Baker, Id. 309; Brinley v. Spring, 7 Id. 241; Ulmer v. Hills, 8 Id, 326; Cutter v. Copeland, 18 Me. 127; Bartlett v. Blake, 37 Id. 124; Googins v. Gilmore, 47 Id. 9.

[8] Haven v. Law, 2 N. H. 13; Coburn v. Pickering, 3 Id. 415; Lewis v. Whitemore, 5 Id. 364; Ash v. Savage, Id. 545; Kendall v. Fitts, 2 Fost. 1; see 1 Smith's Lead. Cas. (Am. ed. 1855), 63, 64.

[9] Sterling v. Van Cleve, 7 Halst. 285; Hendricks v. Mount, 2 South. 738; Bank of New Brunswick v. Hassert, Saxt. 1; Cumberland Bank v. Hann, 4 Harris, 166; Miller v. Pancoast, 5 Dutch. 250; see Livermore v. McNair, 34 N. J. Eq. 478.

[10] Barr v. Hatch, 3 Ohio, 527; Shaw v. Lowry, Wright's Ch. (Ohio), 190; Hombeck v. Van Metre, 9 Ohio, 153; see 1 Smith's Lead. Cas. (Am. ed. 1852), 56; Id. (ed. 1855), 80.

[11] Milburn v. Waugh, 11 Mo. 369; Kuykendall v. McDonald. 15 Id. 416; Claflin v. Rosenberg, 42 Id. 439; s. c. 43 Id. 593; State v. Tasker, 31 Id. 445; State v. Smith, 31 Id. 566; State v. Evans, 38 Id. 150; Howell v. Bell, 29 Id. 135; see 1 Smith's Lead. Cas. 82.

[12] Vernon v. Morton, 8 Dana, 247; Christopher v. Covington, 2 B. Mon. 357; but see Gen. Stat. (ed. 1881), page 489, § 3.

[13] Callen v. Thompson, 3 Yerg. 475; Darwin v. Handley, Id. 502; Maney v. Killough, 7 Id. 440; Mitchell v. Beal, 8 Id. 142; 1 Smith's Lead. Cas. 81; see Ragan v. Kennedy, 1 Tenn. 91.

[14] Davis v. Turner, 4 Gratt. 422; see Curd v. Miller's Ex'rs, 7 Id. 185; see Bump on Fraud. Conv. pp. 149 *et seq.*

[15] Fleming v. Townsend, 6 Ga. 103; Carter v. Stanfield, 8 Id. 49; 1 Smith's Lead. Cas. 82.

[16] Noble v. Coleman, 16 Ala. 77; Dearing v. Watkins, Id. 20; Millard v. Hall, 23 Id. 209; see 1 Smith's Lead. Cas. 55–57; Constantine v. Twelves, 29 Ala. 607; Perry Insurance & Trust Co. v. Foster, 58 Ala. 502.

Texas,[1] Mississippi,[2] Louisiana,[3] Wisconsin,[4] Michigan,[5] and Nebraska.[6]

§ 274. *The Rule in New York.*—In New York, the question as to the necessity of a delivery of possession of goods sold, mortgaged or assigned, to the validity of the transfer, was, after much fluctuation in the decisions of the Supreme Court,[7] settled by the Revised Statutes, which provide that "Every sale made by a vendor, of goods and chattels in his possession, or under his control, and every *assignment* of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an *immediate delivery*, and be followed by an *actual* and *continued change of possession*, of the things sold, mortgaged or assigned, shall be *presumed* to be *fraudulent* and void, as against the creditors of the vendor, or the creditors of the person making such assignment, or subsequent purchasers in good faith; and shall be *conclusive* evidence of fraud, *unless* it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in *good faith*, and without any intent to defraud such creditors or purchasers."[8] The effect of this provision is to throw upon the vendee, mortgagee, or assignee of personal property, who suffers the possession to remain unchanged, the burden of destroying the presumption of fraud which the fact of withholding possession

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[1] Bryant v. Kelton, 1 Tex. 415; McQuinnay v. Hitchcock, 8 Id. 33; Van Hook v. Walton, 28 Id. 59; Howerton v. Holt, 28 Id. 51.

[2] Summers v. Roos, 43 Miss. 749; Jayne v. Dillon, 27 Id. 283; Rankin v. Holloway, 3 Sm. & M. 614; Comstock v. Rayford, 1 Sm. & M. 423; s. c. 12 Sm. & M. 369.

[3] Keller v. Blanchard, 19 La. Ann. 53; Gruce v. Sanders, 21 Id. 463; Haile v. Brewster, 13 Id. 155; see Zacharie v. Kirk, 14 Id. 433.

[4] Whitney v. Brunette, 8 Wis. 621; Smith v. Welch, 10 Id. 91; Bullis v. Borden, 21 Id. 135.

[5] Jackson v. Dean, 1 Doug. 519.

[6] Morgan v. Bogue, 7 Neb. 429.

[7] See a review of the cases in Bump on Fraud. Conv. pp. 137 *et seq.*; also in 2 Kent's Com. [526–529] 679–684, and note.

[8] 3 Rev. Stat. (7th ed.) p. 2328, § 5.

raises.[1] It is further declared that the question of fraudulent intent shall be deemed a question of *fact*, and not of *law*.[2] A number of adjudications have taken place under these provisions, the result of which has been, to settle the doctrine that the whole question of fraud, in these cases, is a question of fact for a jury.[3] A court of equity, however, is competent to pronounce upon the question;[4] and a large proportion of the cases in this State, in which the principle has been applied to voluntary assignments by debtors, have been cases in equity, without the intervention of a jury. Thus, in Butler v. Stoddard,[5] in the Court of Chancery, which was a case of an absolute assignment of goods and accounts to certain creditors, the assignor, after execution of the assignment, was left in possession, to sell the goods and collect the accounts for the sole benefit of the assignees, they paying him a certain compensation for his services as their agent. The assignment was declared fraudulent and void; the court holding that the nominal appointment of the assignor as agent of the assignees, without any visible change in the mode of doing business at the store, was not a change of possession within the meaning of the statute; that there must be an actual and continued change of possession, as well as a nominal and constructive change, or the transaction would be deemed fraudulent as against creditors. So, in Connah v. Sedgwick,[6] where a bill was filed in the Supreme Court, in equity, to set aside an assignment, and for an injunction and receiver, it was held by the court that under

[1] 2 Kent's Com. [529] 681, note a; see Williams v. Lowdnes, 1 Hall, 579, 596.

[2] 3 Rev. Stat. (7th ed.) p. 2329, § 4.

[3] 2 Kent's Com. [529] 681–684, note, where the cases are reviewed. In Vance v. Phillips (6 Hill, 433), it was decided that where the validity of a sale of chattels depends upon whether it was made with *intent* to defraud creditors, however clear and conclusive the evidence of fraudulent intent may be, the judge is bound to submit the case to the jury. But if the jury find against the evidence, the court will set aside the verdict, and grant a new trial. See also Edgell v. Hart, 13 Barb. 380; and see 1 Smith's Lead. Cases (Am. ed. 1855), 68–71.

[4] See the observations of Wing, P. J., in Hollister v. Loud, 2 Mich. 309, 313.

[5] 7 Paige, 163; affirmed on appeal, 20 Wend. 507.

[6] 1 Barb. S. C. 210.

the provisions of the statute, unless an assignment made by a debtor for the benefit of his creditors is accompanied by an immediate delivery of the assigned property, and is followed by an actual and continued change of possession, the courts are bound to presume it fraudulent and void, as against creditors; and to regard it as conclusively so, unless they are satisfied that it was made in good faith, and without any attempt to defraud. Several decisions to the same point have been made by the vice-chancellor of the first circuit.[1] The circumstances of leaving the household furniture of the assignor in his possession for eleven months, without explanation, was held to be evidence of fraud.[2] Nor will a lease of it by the assignee render the transaction valid, where the assignor continues in possession.[3] And the possession of things in action remaining in the assignor after they have been assigned for creditors, requires explanation, as well as that of goods and chattels.[4] And in a case where a substantial portion of the assigned property, consisting principally of promissory notes and household furniture, was suffered to remain in the assignor's possession for three months after the execution of the assignment, it was held indispensable, in order to rebut the presumption of fraud, that the assignee should prove the existence of the indebt-

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[1] Van Nest v. Yoe, 1 Sandf. Ch. 4; Mead v. Phillips, Id. 83; Cram v. Mitchell, Id. 251; Einstein v. Chapman, 42 N. Y. Super. Ct. 144; Ball v. Loomis, 29 N. Y. 412; Wilson v. Forsyth, 24 Barb. 105; see also Hart v. Acker, and Scholefield v. Hull, cited in Edwards on Receivers (ed. 1857), 408, 410; Van Buskirk v. Warren, 4 Abb. Dec. 457; see also Pine v. Rikert, 21 Barb. 469; and see *post*, Chap. XXX.

[2] Cram v. Mitchell, *ubi supra*.

[3] Dewey v. Adams, 4 Edw. Ch. 21.

[4] Mead v. Phillips, 1 Sandf. Ch. 82. This is so held on the common law principle, that the non-delivery of a chose in action, at the time of its assignment, is a badge of fraud. Sandford, A. V. C., Id. 88; Paige, P. J., in Browning v. Hart, 6 Barb. 91, 94. But the provision of the Revised Statutes (2 R. S. 136, § 5; 3 R. S. (7th ed.) p. 2328), which requires the immediate delivery, and an actual and continued change of possession of goods and chattels sold, mortgaged, or assigned, has been repeatedly held not to embrace choses in action. Paige, P. J., in Browning v. Hart, *ubi supra*; Curtis v. Leavitt, 17 Barb. 309, 310. And see, as to the retention of choses in action assigned for the benefit of creditors, Tompkins v. Wheeler, 16 Pet. 106.

edness in consideration of which the assignment was ostensibly made.[1]

The rule in New York may now be regarded as settled, that the fact of there being no change of possession is presumptive evidence of fraud, and conclusive, unless rebutted by affirmative evidence of good faith and the absence of an intent to defraud.[2]

Where personal property has been levied upon under an execution and is in the possession of the sheriff at the time of the assignment by the judgment debtor, the transaction is not within the above statute requiring immediate delivery.[3]

Real estate is not included in the express language of the statute. The continuance in possession of a grantor of real estate after the conveyance, does not of itself warrant a finding as a legal conclusion that the deed was fraudulent.[4] But where the debtor was permitted to retain possession of real estate which he had assigned, for a number of years, under a nominal lease to his son, without paying any rent, the conveyance was declared fraudulent and void, as against creditors.[5]

A failure, however, to comply with the statute is an objection which can be taken only by creditors. The fact that assignees, immediately after the acceptance of the assignment, refused to take possession of the entire property, does not deprive them of their rights, nor relieve them of their obligations under it.[6]

§ 275. *The Rule in the United States Courts.*—The

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[1] Jacobs v. Remsen, 36 N. Y. 668; and see Terry v. Butler, 43 Barb. 395; Van Buskirk v. Warren, 39 N. Y. 119; Miller v. Lockwood, 32 Id. 293; Thompson v. Blanchard, 4 Id. 303.

[2] Mead v. Phillips, 1 Sandf. Ch. 83.

[3] Mumper v. Rushmore, 79 N. Y. 19; affirming 14 Hun, 591.

[4] Clute v. Newkirk, 46 N. Y. 684; Every v. Edgerton, 7 Wend. 259; see Jackson v. Cornell, 1 Sandf. Ch. 348.

[5] Bank of Orange Co. v. Fink, 7 Paige, 87; see Mead v. Phillips, 1 Sandf. Ch. 83; Dolson v. Kerr, 5 Hun, 643; Hitchcock v. St. John, Hoffm. Ch. 511; Dewey v. Adams, 4 Edw. Ch. 21.

[6] Sheldon v. Stryker, 42 Barb. 284; s. c. 27 How. Pr. 387.

question of the necessity of a change of possession to the validity of a transfer of property, as against creditors, has also been discussed in the courts of the United States. In the case of Hamilton v. Russell,[1] the strict rule was laid down by the Supreme Court, that an absolute bill of sale of a personal chattel by an insolvent, was fraudulent against creditors, unless possession of the property assigned or transferred, accompanied or followed the deed, and that the absence of such possession was not merely evidence of fraud, but was a circumstance, *per se*, which made the transaction fraudulent. In the subsequent case of the United States v. Hooe,[2] the court held that the rule did not apply to a deed of trust of lands to trustees, by way of indemnity of a surety of the grantor. In Conrad v. Atlantic Insurance Company,[3] the court avoided expressing an opinion on the question whether, in any case, the want of possession of the thing sold, constitutes, *per se*, a badge of fraud, or is only *prima facie* a presumption of fraud; Mr. Justice Story, who delivered the opinion of the court, observing that it was "a question upon which much diversity of judgment has been expressed."[4] It is to be observed, however, that the learned judge had, in an earlier case,[5] in the Circuit Court of Massachusetts, adopted the more rigid rule, and applied it to the case of a voluntary assignment by a debtor. In Brooks v. Marbury,[6] the Supreme Court refused to apply the doctrine of Hamilton v. Russell to the case of a deed of trust for the benefit of creditors; observing that the continuance of the possession with the donor until the trust could

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[1] 1 Cranch, 309. [2] 3 Cranch, 73. [3] 1 Pet. 386. [4] Id. 449.

[5] Meeker v. Wilson, 1 Gall. 419. "By the common law, a grant or assignment of goods and chattels is valid between the parties, without actual delivery thereof; and the property passes immediately upon the execution of the deed. But, as to creditors, the title is not considered as perfect unless possession accompanies and follows the deed. The want of possession is considered in some of the authorities, as an evidence or badge of fraud to be submitted to the jury; but the more modern authorities hold it as constituting in itself, in point of law, an actual fraud, which renders the transactions, as to creditors, void." Story, J., Id. 422, 423.

[6] 11 Wheat. 78.

be executed, might not be so incompatible with the deed as to render it absolutely void under all circumstances. The court, however, as in Conrad v. Atlantic Insurance Company, declined expressing any opinion on this point, further than to say, that it was not supposed to be decided in Hamilton v. Russell.

§ 276. *Possession not Evidence of Fraud.*—A third rule on the subject of delivery of possession of property assigned, which prevails in some States, is that retention of possession by an assignor is not even presumptive evidence of fraud, but is consistent with the validity of the assignment. This rule is constantly applied to those deeds of trust, already mentioned as peculiar to the southern States, which are executed by way of security to creditors, and which provide for a sale of the property in case the debt secured is not paid; and in which, also, express provision is frequently made for the retention of possession by the debtor. The formality of a *record* or registry, which is usually necessary to the validity of these instruments as of mortgages, dispenses with the necessity of a delivery of possession; and the general principle applied is, that it is of the nature of a security, that the debtor should retain possession until the day of payment be past.[1] Thus, in Virginia, delivery of possession to the trustee never occurs on the execution of a deed of trust, but possession remains with the debtor until the time to sell.[2] In this State, it has been decided that the inconsistency of the debtor's possession with the deed is the matter which constitutes fraud.[3] In Mississippi,[4] and Alabama,[5] possession by the debtor until the sale, is not incon-

[1] 1 Tuck. Com. [338] 327; Hempstead v. Johnson, 18 Ark. 309.

[2] 1 Tuck. Com. [340] 329; Land v. Jeffries, 5 Rand. 211, 252; and see 1 Smith's Lead. Cas. (Am. ed. 1855), 58-63.

[3] Land v. Jeffries, *ubi supra.*

[4] Layson v. Rowan, 7 Rob. (La.) 1; Comstock v. Rayford, 12 Sm. & M. 369. In this State, delivery is not necessary to the completion even of a sale of personal property. The statute of frauds, 29 Car. II, c. 3, has not been re-enacted. Ingersoll v. Kendall, 13 Sm. & M. 611.

[5] Ravisies v. Alston, 5 Ala. 297. But possession *after* the sale is evidence of

sistent with the deed, and raises no presumption of fraud. In the last-named State, it has been decided that where a deed of assignment is not fraudulent on its face, the possession and use of the property by the assignor, in conformity with the express provisions of the deed, cannot render it void.[1] And it has been declared to be well settled that the retention of possession by a grantor in a deed of trust, if such possession is consistent with the terms of the deed, is not a badge of fraud; nor is it a circumstance from which an inference of fraud would necessarily arise.[2] A similar practice of retaining possession until a sale under a deed of trust, prevails in North Carolina; the courts approving it as being more convenient for all parties that the possession should not be changed.[3] In Kentucky, the same rule has been recognized; and in a case where one of a firm who had assigned their effects to trustees, for the benefit of their creditors, was retained by the trustees to aid them in executing the trust, and so remained in possession of the goods conveyed, such continued possession was held to be no evidence of fraud.[4] The same rule, as already mentioned, now prevails also in Pennsylvania, the record of the assignment and a compliance with other statutory requisitions being held to dispense with the necessity of a delivery.[5] In this State, indeed, an assignment duly recorded stands upon the footing of a transfer by law; because, as the statute gives the creditors a right to have the trust that is expressed in the deed executed for their benefit by the court, the whole trust becomes vested in them in equity, under the immediate

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fraud, though capable of being rebutted by showing some sufficient reason why the possession was permitted to remain. Id. ibid.; McGee v. Carpenter, 4 Id. 469; see 1 Smith's Lead. Cas. (Am. ed. 1852), 55; Id. (ed. 1855), 55–57.

[1] Abercrombie v. Bradford, 16 Ala. 560.

[2] Hopkins v. Scott, 20 Ala. 179; Ligon, J., Id. 184.

[3] Dewey v. Littlejohn, 2 Ired. Eq. 495, 507.

[4] Vernon v. Morton, 8 Dana, 247; see Christopher v. Covington, 2 B. Mon. 357; but see Gen. Stats. (1881), p. 489, § 3.

[5] Mitchell v. Willock, 2 W. & S. 253; Klapp's Assignees v. Shirk, 13 Penn. St. 589.

administration of the court; and therefore an assignment recorded is in effect a transfer to the creditors by the act of law, and the recording gives the transaction all the publicity of a judicial proceeding.[1]

§ 277. *The Prevailing Rule and Exceptions.*—On the whole, the predominant rule in the United States appears to be, that possession must accompany and follow a deed of assignment by a debtor; and the possession of the assignor, after the transfer, unless explained, will render the assignment void as against creditors. But this rule is limited and qualified by several *exceptions*, which will now be noticed. Thus, the rule applies in a peculiar manner to *personal* property. The provision of the New York statute confines it, in terms, to "goods and chattels;[2] and the distinction in this respect between personal and real estate has been clearly drawn by the courts in Connecticut"[3] and Ohio.[4] The same limitation was admitted by Mr. Justice Story, in Phettiplace v. Sayles,[5] in the Circuit Court for the District of Massachusetts.[6]

Another exception to the rule has been admitted, where the possession of the grantor or assignor is *consistent* with the *deed*;[7] that is, with its general nature and object,[8] as well as with its express provisions. The mere circumstance

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[1] 1 Smith's Lead. Cas. (Am. ed. 1852), 70, 71; Id. (ed. 1855), 75.

[2] 3 Rev. Stats. (7th ed.) p. 2328, § 5. The bare fact that a grantor remains in possession of lands conveyed by him, is not enough, uncorroborated by other circumstances, to subject the transaction to the imputation of fraud. Every v. Edgerton, 7 Wend. 259. In Jackson v. Cornell (1 Sandf. Ch. 348), the possession of real estate assigned, continuing in the assignor, was considered to be evidence of fraud. It appears in this case, that the assignor had collected the rents of the property assigned, and retained a portion for his own use.

[3] Church, J., in Strong v. Carrier, 17 Conn. 319.

[4] Sherman, J., in Barr v. Hatch, 3 Ohio, 527.

[5] 4 Mason, 312, 321.

[6] For the reason of the distinction, see Id. 321, 322; Tompkins v. Wheeler, 16 Pet. 112, arg.

[7] Story, J., in Meeker v. Wilson, 1 Gall. 419, 423; Putnam, J., in Bartlett v. Williams, 1 Pick. 295; Marshall, C. J., in Brooks v. Marbury, 11 Wheat. 78; and see Dawes v. Cope, 4 Binn. 258; Gibson, J., in Clow v. Woods, 5 S. & R. 278, 279; Land v. Jeffries, 5 Rand. 211, 252.

[8] Lord Mansfield, in Cadogan v. Kennett, Cowp. 432, 436.

that the deed contains an express provision for the continuance of possession in the grantor, will not take the case out of the rule, where it is inconsistent with the character of the transfer itself.[1] This branch of the subject has already been considered under a former head.

Again, the rule ceases to have application where the creditors expressly *assent* to the assignors continuing in possession. Thus, in Tompkins v. Wheeler[2] (which was a case of an assignment directly to creditors), after the assignment, the creditors for whose benefit it was made neglected to appoint an agent or trustee to execute it, and the property assigned remained in the hands of the assignor. The property consisted principally of choses in action, which the assignor went on to collect, and divided the proceeds among the creditors under the assignment. No one of the creditors was dissatisfied, and at any time they could have taken the property out of the hands of the assignor. It was held by the Supreme Court of the United States, that leaving the property in the hands of the assignor, under these circumstances, did not affect the assignment, or give a right to a creditor not preferred by it to set it aside.

Finally, the application of the rule requiring a delivery of possession of property assigned depends upon the fact, whether such delivery be *possible*, under the circumstances of the case. This will be more fully considered under the head immediately following.

§ 278. *Time and Mode of Delivery.*—As a general rule, in order to avoid all ground of objection to the validity of the assignment, possession of the personal property assigned should always, if practicable, *accompany* the assignment. But where, from the circumstances of the property, *immediate* possession is not within the power of the parties, as in the case of a ship or goods at sea, it will be dispensed with upon the plain ground of its impossibility; and all that will be

[1] 1 Tuck. Com. [338] 327; Id. [341] 330.

[2] 16 Pet. 106. And see Steel v. Brown, 1 Taunt. 381.

required will be, that the assignee take possession of the property within a reasonable time after it comes within his reach.[1] And even where the property assigned is, in its nature capable of immediate delivery, the assignee will be entitled to a reasonable time to take possession.[2] Thus, in Pennsylvania, where the trustee lived at a distance, and did not hear of the assignment until four days after it was made, when he assented, and the debtor continued in possession one day and part of another, after the execution of the deed, the assignment was sustained by the court.[3]

In regard to the *mode* of delivery it may be observed, generally, that possession of lands is delivered by delivery of the deed;[4] of goods, by an actual delivery of the goods themselves, or a constructive delivery, where this is impracticable;[5] and of debts or choses in action, by delivery of the evidences of them. Delivery of the evidence of a debt is a sufficient delivery of the possession of it.[6] Notice to the debtor is necessary in some cases; but not in transfers of bills of exchange or notes payable to order previous to maturity; nor afterwards, but to prevent the parties bound from acquiring equities against the holder, to which they might be entitled, if not notified.[7]

§ 279. *Constructive Delivery.*—In regard to goods, or personal chattels, a *constructive* or symbolical delivery is allowed in many cases where an actual delivery is physically impracticable.[8] Thus, in the case of the assignment of a vessel while abroad or at sea, a delivery of the bill of sale,

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[1] Story, J., in Conard v. Atlantic Insurance Company, 1 Pet. 386, 449; Harris v. D'Wolf, 4 Id. 147, 151; Meeker v. Wilson, 1 Gall. 419, 423; Wheeler v. Sumner, 4 Mason, 183; D'Wolf v. Harris, Id. 515; Bholen v. Cleveland, 5 Id. 174; Brown v. Minturn, 2 Gall. 557; Portland Bank v. Stacy, 4 Mass. 661; Gardner v. Howland, 2 Pick. 599; Hodges v. Harris, 6 Id. 360; Dawes v. Cope, 4 Binn. 258; Carpenter v. Mayer, 5 Watts, 485; Eagle v. Eichelberger, 6 Id. 29; Langdon v. Horton, 1 Hare (23 Eng. Ch. R. Am. ed.), 549; Bump on Fraud. Conv. p. 198.

[2] Ingraham v. Wheeler, 6 Conn. 267.

[3] Wilt v. Franklin, 1 Binn. 502.

[4] See *ante*, p. 389.

[5] See *infra*, § 277.

[6] United States v. Bank of the United States, 8 Rob. (La.) 262.

[7] Id. ibid.

[8] Parker, C. J., in Gardner v. Howland, 2 Pick. 599, 602.

and other documents or muniments of title, will be sufficient to pass the property, if accompanied by an actual delivery of possession, as soon as conveniently may be, after the vessel arrives in port.[1] In case of the assignment of goods on board an absent vessel, there should be a delivery to the assignee, of the bill of lading and an invoice, with an assignment indorsed;[2] and an assignment and delivery of a duplicate of the invoice alone, where there was no other paper in the hands of the assignor, has been held sufficient as a symbolical delivery of the property.[3] It has been held that a failure to deliver to the assignee copies of bills of lading in the assignor's possession, did not leave the property subject to the attachment of creditors who had no notice of the deed.[4] And in D'Wolf v. Harris,[5] which was a case of an assignment of goods at sea, it was held that an indorsement of the bill of lading was not indispensable to perfect the assignment, and that it was sufficient if there was a good assignment of the property by a conveyance with apt words.

A symbolical delivery is also sufficient in those cases where the goods assigned, though physically accessible, are in the possession or custody of a third person, under some lawful title. Thus, in a case in Massachusetts, where the goods assigned had been previously mortgaged, and were at the time in the custody of an officer under an attachment, and the assignee went to the store, gave notice to the officer of the assignment, and said that he took possession of the goods, and did take the account books—it was held that such a symbolical delivery of possession was sufficient.[6]

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[1] This is the rule in regard to sales and mortgages of vessels. 2 Kent's Com. [132, 133] 175, 176.

[2] See Gardner v. Howland, 2 Pick. 602, 603; Balderston v. Manro, 2 Cranch's C. C. 623. Where goods were shipped for a foreign port, the delivery of the bills of lading and the policy of insurance was held sufficient in the first instance. Dawes v. Cope, 4 Binn. 258. Notice of the assignment is usually given to the master. See Langton v. Horton, 1 Hare (23 Eng. Ch. R. Am. ed.), 549.

[3] Gardner v. Howland, 2 Pick. 602, 603.

[4] Conard v. Atlantic Insurance Co. 1 Pet. 386. [5] 4 Mason, 515.

[6] Mann v. Huston, 1 Gray, 250; Dewey, J., Id. 253. A symbolical delivery, by a transfer of the keys of the place where the goods are stored, makes a valid

A symbolical delivery, however, as of a small portion of the goods for the whole, will not be sufficient, where an actual delivery is practicable.[1] Thus, in Pennsylvania, in a case where possession was retained by the assignor, after such a symbolical delivery, the assignment, although accompanied by a schedule of the goods, was declared void.[2] In Massachusetts, a delivery of a portion of the goods, in token of a delivery of the whole, was held to be a constructive delivery of goods embraced in the assignment, which were at a distance from the place where the actual delivery of the portion was made, and which were in the hands of a third person, and subject to a lien for his labor upon them.[3]

§ 280. *Actual and Continued Change.*—It is a further rule, that possession of the goods assigned must not only be *actually* changed, but such change must be *continued.* This is the express language of the statute in New York,[4] and was formerly the declared rule in Pennsylvania.[5] The assignee must not only take but keep possession, and there must be no redelivery to the assignor.[6]

As to the character of the possession thus delivered, it is also held that it must be an *exclusive* one. A joint possession by the assignor and assignee, of personal property assigned, is colorable, and an evidence of fraud, unless explained.[7] But this rule is more or less modified by the rule

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transfer of the title. Bullis v. Montgomery, 50 N. Y. 352; citing Hollingsworth v. Napier, 3 Caines, 182, note a; Dunham v. Pettee, 8 N. Y. 508. So, where the assignor secured a third person to execute to the assignee a paper in which he acknowledged the receipt of the property from the assignee, and agreed to deliver the same to him by a certain day, and in default thereof to pay him a certain sum of money, this instrument was adjudged to have the effect of a delivery bond. Leverenz v. Haines, 32 Ill. 357.

[1] Hitchcock v. St. John, 1 Hoff. Ch. 511, 522.

[2] Cunningham v. Neville, 10 Serg. & Rawle, 201. This was before the act of June 14, 1836.

[3] Legg v. Willard, 17 Pick. 140. [4] 3 Rev. Stat. (7th ed.) p. 2328, § 5.

[5] Young v. McClure, 2 Watts & Serg. 147.

[6] As to the effect of a lease of the property by the assignee to the assignor, see Hitchcock v. St. John, 1 Hoff. Ch. 511; Dewey v. Adams, 4 Edw. Ch. 21.

[7] This is the rule in Indiana. Caldwell v. Rose, Smith, 190; Caldwell v. Williams, 1 Ind. 405. In Vermont, a concurrent possession of personal prop-

allowing the assignor to be employed, on certain conditions, as the assignee's agent, and to remain in possession in that capacity.

Where the delivery of the property to the assignee is complete, it is not essential that the property itself should be *removed* from the place of delivery. This was decided in New York, in the case of Hitchcock v. St. John.[1] The assistant vice-chancellor, in delivering his opinion in this case, after noticing the opinions of the Supreme Court to the contrary,[2] observed, "that the sole question was whether there was an open and actual change of the possession and control, the exclusion of the assignor, and the notorious and avowed dominion of the assignee. A possession and control might be resumed by the assignor after the removal; and removal was not, therefore, conclusive evidence of fairness. The exclusion of the assignor might be as absolute and the change of control as marked, while the property was retained upon the premises, as if it was removed."[3]

§ 281. *Retention of Part.*—Where an assignment of the debtor's whole property has been made in good faith, for the benefit of all the creditors, its validity will not be impaired by the assignor's withholding a portion of the property actually conveyed; for it has become the property of the assignee, and he can recover it by action.[4] In a case in New York, it was held, that although it is a general rule, that, to give full effect to an assignment of personal property, delivery of the property and a continued

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erty by the vendor and vendee, after a sale, renders the sale fraudulent *per se*, as to the creditors of the vendor. Hall v. Parsons, 17 Vt. 271.

[1] 1 Hoff. Ch. 511.

[2] In Randall v. Cook, 17 Wend. 56; and in Collins v. Brush, 19 Id. 199; commented on by the assistant vice-chancellor in Lee v. Huntoon, Hoff. Ch. 447, 457.

[3] And see the opinion in Lee v. Huntoon, *ubi supra;* and see Hall v. Wheeler, 18 Ind. 371.

[4] Pike v. Bacon, 21 Me. 280; see Wilson v. Forsyth, 24 Barb. 105; Eicks v. Copeland, 53 Tex. 581.

change of possession are requisite, and the assignor's continuing in possession of the whole or even a part of the assigned property, is a badge of fraud—yet, where there is no inventory of the assigned property accompanying the assignment, the assignor's retaining some property that he might have assigned, or that (being covered by the general terms of his assignment) he might have delivered under it, is not an act that of course makes his whole assignment void.[1]

§ 282. *Delivery of Chattel not in Schedule.*—On the other hand, a delivery of more property than has been specifically conveyed, as of an article not named in the schedule annexed, will sometimes bind the assignor. Thus, in Massachusetts, where a debtor assigned property described in a schedule, in trust for his creditors, and afterwards delivered to the assignee a chattel not included in the schedule, either knowing that it was not so included therein, or intending, whether it was so included or not, that it should be appropriated to the benefit of his creditors; it was held that the property in the chattel passed to the assignee in trust for the creditors, and that the assignor could not reclaim it.[2]

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[1] Gould, J., in Wilson v. Forsyth, 24 Barb. 127, 128; but see Mead v. Phillips, 1 Sand. Ch. 83.

[2] Faxon v. Durant, 9 Metc. 389.

CHAPTER XX.

ASSENT OF CREDITORS.

§ 283. Where property in which one or more individuals are interested as creditors has become, from the circumstances of its owner, exposed to danger of loss, the parties so interested would seem to have an equitable right to be apprised of any arrangements for the disposition of such property; especially where such arrangements materially affect the remedies with which the law has provided them. And the professed object of assignments by insolvent or embarrassed debtors, being the *benefit of their creditors*, a desire for the most effectual accomplishment of that object would seem naturally to lead a debtor, whose circumstances induce or compel him to contemplate such a disposition of his property, to acquaint his creditors with his intention and the reasons of it. This is, in some instances, actually done; the debtor not only informing his creditors, but consulting them with a view to their concurrence in the arrangements proposed; and, to use the words of an eminent judge,[1] "the propriety of pursuing such a course will generally suggest it, where they can be conveniently assembled." It is, nevertheless, clearly unnecessary to the validity of a voluntary assignment by a debtor, that the creditors should be consulted *previous* to making it;[2] and probably, in the majority of actual cases, creditors are not only not consulted, but not even apprised of the debtor's intention. Circumstances, in-

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[1] Marshall, C. J., in Brashear v. West, 7 Pet. 608, 613.

[2] Brashear v. West, 7 Pet. 608, 613; see Reinhard v. Bank of Kentucky, 6 B. Mon. 252; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; Phippen v. Durham, 8 Gratt. 457; Lee, J., in Johnston v. Zane's Trustees, 11 Id. 552, 564; Allen, P., in Dance v. Seaman, Id. 778, 781. See the exception in Pennsylvania. Resolution of January 21, 1843, p. 867, cited *post*, p. 417.

deed, often render it necessary that assignments planned on the most equitable principles, should, when once determined on, be carried into effect with the least delay possible. The previous communication of the debtor's intention would tend to defeat the object, or impair the efficiency, of these conveyances, by stimulating some particular creditor to gain, by prompt action, that preference with which the law itself rewards superior vigilance and diligence, and thus pay himself in full out of property intended for general and equal distribution.

It has sometimes been held, however, that *after* an assignment has been made, it must receive the assent, sanction or approval of the creditors, in order to give it validity, and render it an operative transfer. To what extent this doctrine is correct, becomes an important consideration, which will form the subject of the present chapter.

The necessity of assent, it may be observed, depends in a material degree upon the form of the assignment itself, as being either to an assignee in trust, or directly to creditors.

§ 284. *Assent to Assignments to Trustees.*—Where the assignment is to a *trustee* for the benefit of creditors not parties to the deed, it may be laid down as a general rule in American law, that the assent of the creditors is not necessary to its validity; and the legal estate or title will pass to the assignee without such assent, so as to prevent a judgment creditor from acquiring a lien, if real, by his judgment, or if personal, by his execution, unless upon the ground of fraud.[1] This rule is said to be founded on the established

[1] Nicoll v. Mumford, 4 Johns. Ch. 522, 529; Halsey v. Whitney, 4 Mason, 207, 214; Cunningham v. Freeborn, 11 Wend. 240, 248; Houston v. Nowland, 7 Gill & J. 480, 492; Garland, J., in United States v. Bank of the United States, 8 Rob. (La.) 262, 412; Reinhard v. Bank of Kentucky, 6 B. Mon. 252; Abercrombie v. Bradford, 16 Ala. 560. The Governor, use, &c. v. Campbell, 17 Id. 556; Rankin v. Lodor, 21 Id. 380; Jones v. Dougherty, 10 Ga. 273; Sadlier v. Fallon, 4 R. I. 490; Forbes v. Scannell, 13 Cal. 242; Valentine v. Decker, 43 Mo. 583. In Robbins v. Magee (76 Ind. 381), a composition agreement and a voluntary assignment are held to differ in this:—that the former depends for its force on the agreement of all the contracting parties, while the latter is not dependent for its validity upon the consent of creditors.

principle of the common law,[1] that it is not necessary to the creation of a trust by deed in favor of any persons, that the *cestui que trust* should either be a party or assent to it. If the trust be for his benefit, the law presumes his assent to it until the contrary is shown. And it is clear that trusts may lawfully be created where there can be no present assent, for they may be in favor of persons not in existence. It is sufficient, in general, that in such cases there is a competent grantor to convey, and a competent grantee to take, the property.[2] "Deeds of trust," observes Chief Justice Marshall, "are often made for the benefit of persons who are absent,[3] and even for persons who are not in being. Whether they are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made has ever been required as preliminary to the vesting of the legal estate in the trustee. Such trusts have always been executed on the idea that the deed was complete when executed by the parties to it."[4]

From these views, the rule has been deduced, and very clearly laid down by Mr. Justice Story, in the leading case of Halsey v. Whitney,[5] that, in case of an assignment to a trustee for the benefit of creditors, "where the trust is for the benefit of all, and no release or other condition is stipulated for on behalf of the debtor, but the property is to be distributed equally among all the creditors, *pro rata*, the assent of the creditor must be presumed; for the trust can-

[1] But see, as to the rule in England, *post*, p. 418; and see Gibson v. Rees, 50 Ill. 388. In some of the States, by statutory enactment the assent of creditors is presumed. See Iowa Code (1880), § 2116; Price v. Parker, 11 Iowa, 144; Gen. Stats. of N. H. (1878), c. 140, § 3. The assent of creditors is presumed, unless their dissent is made known to the assignee within thirty days after public notice given of the assignment. But when the assignment is not in accordance with the terms of the statute, the assent of creditors is not presumed. Derry Bank v. Davis, 44 N. H. 548. So where the assignment is invalid. Fellows v. Greenleaf, 43 N. H. 421.

[2] Story, J., in Halsey v. Whitney 4 Mason, 206, 214.

[3] The assent of absent persons to an assignment, will be presumed until their dissent be expressed, if it be made for a valuable consideration, and be beneficial to them. North v. Turner, 9 Serg. & R. 224.

[4] Marshall, C. J., in Brooks v. Marbury, 11 Wheat. 78, 97.

[5] 4 Mason, 206.

not be for his injury, and must be for his benefit. It must always be for his benefit to receive as much of his debt as a debtor can pay. If then, in such a case, such an assent be necessary, it may be inferred as a presumption of law, until the contrary is shown." "That which purports to have been done for the benefit of creditors," observes Mr. Justice McLean, in the case of Lawrence v. Davis,[1] "and which was manifestly for their advantage, will be presumed to have been done with their assent, unless the contrary appear." The same rule has been approved by the Supreme Court of the United States,[2] and in the case of Tompkins v. Wheeler,[3] was expressly applied to the case of an assignment directly to creditors; the court observing[4] that "where the deed is absolute on its face, without any condition whatever attached to it, and is for the benefit of the grantees, the presumption is, in the absence of all evidence to the contrary, that the grantees accepted the deed."

§ 285. *The Rule in Various States.*—The same rule has been adopted in several of the State courts. In New York, it has long been settled that it is not necessary to the validity of an assignment in trust for the benefit of creditors, that the creditors should be parties to it, or signify their assent thereto;[5] and it makes no difference in this respect whether the assignment be with preferences[6] or without.[7] In North Carolina, it has been held that the assent of creditors to a deed of assignment in trust, is to be presumed, unless the contrary be shown.[8] In Alabama, there have been

[1] 3 McLean, 177.

[2] Brooks v. Marbury, 11 Wheat. 78; Brashear v. West, 7 Pet. 69[illegible]

[3] 16 Pet. 118.

[4] Id. 119, Thompson, J.

[5] Nicoll v. Mumford, 4 Johns. Ch. 522, 529; Cunningham v. Fr[illegible] 240, 248.

[6] Cunningham v. Freeborn, 11 Wend. 240, 248.

[7] Nicoll v. Mumford, 4 Johns. Ch. 522, 529.

[8] Ingram v. Kirkpatrick, 6 Ired. Eq. 462. Chief Ju[illegible] the opinion of the court in this case, places it on th[illegible] soundness of the principle, the prevalent impres[illegible] course of the adjudications in the United State[illegible]

numerous decisions in regard to the necessity and the presumption of the assent of creditors. In the case of Rankin v. Lodor,[1] in the Supreme Court of the State, the general doctrine was stated by Phelan, J., who, in delivering the opinion of the court, laid it down as a "settled legal proposition," that where the provisions of a deed of assignment are clearly beneficial to a creditor, his assent to the deed will be presumed without his signing it; but where it is not so, his assent will not be presumed, but must be actually had.[2] The same doctrine was held in the later case of Lanier v. Driver, in the same court.[3] In the previous case of Townsend v. Harwell,[4] the same doctrine was recognized,[5] but it was further said: "Such assignment will not be considered beneficial unless the deed devotes the property absolutely, and under all circumstances, to the payment of the debts secured,[6] nor where it provides for the delay of the creditors secured to be paid.[7] In other words, the necessity and presumption of assent are made to depend upon the character and object of the deed. The doctrine is very clearly laid down with this distinction, by Ligon, J., in the case of Evans v. Lamar.[8] "A deed," said the learned judge, "which postpones a creditor in the collection of his debt, beyond the time of its maturity, is not valid as a conveyance of the property mentioned in it, until it is assented to by the creditor. Until that time, it is a mere power, and may be revoked by the levy of an execution by the creditor

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[1] 21 Ala. 880.

[2] As authority for these propositions, the learned judge (Id. 889, 890) cited Robinson v. Rapelye, 2 Stew. 86; Ashurst v. Martin, 9 Port. 566; Wiswall v. Ross, 4 Port. 321; Gazzam v. Poyntz, 4 Ala. 374; Kinnard v. Thompson, 12 Id. 487; Governor, use, &c. v. Campbell, 17 Id. 566; Brown v. Lyon, 17 Id. 659; Elmes v. Sutherland, 7 Id. 262; Mauldin v. Armistead, 14 Id. 702; Abercrombie v. Bradford, 16 Id. 560; 2 Story's Eq. § 1036.

[3] 24 Ala. 149.

[4] 18 Ala. 301.

[5] Chilton, J., Id. 303, citing Kinnard v. Thompson, and Gazzam v. Poyntz.

[6] Chilton, J., Id. ibid. citing Dubose v. Dubose, 7 Ala. 235; Allen v. Montgomery & W. P. R. R. Co. 11 Id. 437.

[7] Chilton, J., Id. ibid. citing Lockhart v. Wyatt, 10 Ala. 231; Hodges v. Wyatt, Id. 271.

[8] 21 Ala. 333, 335.

on the property intended to be conveyed by it. Neither will the assent of the creditor to such a deed be presumed.[1] But where the deed is absolute in its terms, and conveys property to the trustees for the benefit of certain specified creditors, who have not executed it, but whose debts are not postponed beyond their maturity, the assent of the creditors will be presumed, and the deed is not a mere power, but will be regarded as a valid, and operative conveyance."[2] In Rankin v. Lodor,[3] Phelan, J., in delivering the opinion of the court, observed: "There is a class of deeds in trust, or assignments, which are not good at all without the assent of all the creditors.[4] * * * * They are generally where a man seeks to postpone the payment of his debts, by conveying property in trust to secure or pay them. In such a case, *all* the creditors must assent, to give *any* validity to the deed, because that is the manifest intention of the grantor."[5] The qualities requisite in a deed of assignment, in order to raise the presumption of assent by creditors, are very clearly stated in the case of Townsend v. Harwell,[6] in the following terms: "Where a deed of assignment for the payment of debts is made to a naked trustee, with the intent on the part of the debtor to delay, hinder, and defraud his creditors, the assent of the creditors will not be presumed, although the deed devotes the property conveyed absolutely and unconditionally to the payment of their debts, and the trustee did not participate in the fraudulent intent; but such assignment will be void as

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[1] The learned judge here cites Nelson v. Dunn, 15 Ala. 502; Lockwood v. Nelson, 16 Id. 294; Smith v. Leavitts, 10 Id. 93; Graham v. Lockhart, 8 Id. 9; and Elmes v. Sutherland, 7 Id. 262.

[2] The learned judge cites Kinnard v. Thompson, 12 Ala. 487; Maulden v. Armistead, 14 Id. 702; and Lockwood v. Nelson, 16 Id. 295.

[3] 21 Ala. 380, 390.

[4] The learned judge here adds: "The class of cases to which I refer, is considered, and the law applicable to them laid down, in the cases of Elmes v. Sutherland, 7 Ala. 262; Hodge v. Wyatt, 10 Id. 271, and Kemp v. Porter, 7 Id. 188.

[5] The learned judge cites Elmes v. Sutherland, 7 Ala. 262.

[6] 18 Ala. 301.

against creditors who have acquired a lien on the property before an *actual* assent is given."[1]

A recital in an assignment declaring preferences, that "the creditors have assented to the terms herein stated," is the mere declaration of the grantor, and does not conclude any creditor who is not otherwise shown to have assented to it.[2]

In Kentucky, it is not sufficient ground to invalidate a deed made for the benefit of creditors, that it was made without their request or knowledge;[3] and their assent will be presumed.[4] The same rule prevails in Michigan.[5] In Georgia, where a deed is for the payment of creditors, their assent will be presumed, unless their dissent be expressed.[6]

In Tennessee, the cases are not entirely in accord, but in a late decision,[7] which reviews all the authorities, it is held that where there is no evidence upon the subject of acceptance or renunciation, except that raised by the presumption that the beneficiaries accepted provisions made for their benefit, this presumption is sufficient to protect the rights of the beneficiaries against attaching creditors.

Prima facie the presumption of acceptance arises, and the filing of an attachment bill does not furnish any evidence rebutting the presumption.

The assent of creditors will always be presumed, provided all the formalities of execution essential to the validity of the deed have been complied with.[8] In Louisiana, the assent of

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[1] Townsend v. Harwell, 18 Ala. 801; and see Benning v. Nelson, 23 Id. 801; Shearer v. Loftin, 26 Id. 703; Ashley v. Robinson, 29 Id. 112; England v. Reynolds, 38 Id. 370; Hodge v. Wyatt, 10 Id. 271.

[2] Lehman v. Tallassee Mfg. Co. 64 Ala. 567.

[3] Reinhard v. Bank of Kentucky, 6 B. Mon. 252.

[4] Stewart v. Hall, 3 B. Mon. 218.

[5] Suydam v. Dequindre, Harring. Ch. 347.

[6] Jones v. Dougherty, 10 Ga. 273; McBride v. Bohanan, 50 Id. 155.

[7] Washington v. Ryan, 5 Baxter (Tenn.), 622; decided mainly on the authority of Farquharson v. McDonald, 2 Heisk. 404; see Dews v. Olwill, 3 Baxter, 432; Green v. Demoss, 10 Humph. 371; Brown v. Vanlier, 7 Id. 239; Field v. Arrowsmith, 3 Id. 442; Saunders v. Harris, 1 Head, 185; Breedlove v. Stump, 3 Yerg. 257

[8] Brevard v. Neely, 2 Sneed, 164; Furman v. Fisher, 4 Cold. 626; but see Mills v. Haines, 3 Head, 332; Brown v. Vanlier, 7 Humph. 239; Nailer v. Young, 7 Lea (Tenn.), 735.

creditors is presumed, in case of an assignment for the benefit of all the creditors, where no release or other condition is stipulated for, or on behalf of the debtor, but the property is to be distributed among all the creditors *pro rata*.[1] In Missouri, an assignment for the benefit of creditors, containing no provision prejudicial to their interests, need not be signed by them; their assent thereto will be presumed in the absence of an attack upon the deed.[2]

And this is the rule in Maryland,[3] Arkansas,[4] Ohio,[5] and Texas.[6] In Ohio and New Hampshire, by statutory enactment, the law presumes the assent of creditors to assignments executed for their benefit.[7] In Rhode Island,[8] assignments without the assent of creditors are held valid; and, it seems, the same rule prevails in New Mexico.[9]

In Indiana,[10] an assignment is valid without the consent of creditors, if made in good faith and in compliance with the statute.

In Pennsylvania, it seems to be no objection to the validity of an assignment to a trustee for the benefit of creditors, that it has not been expressly accepted by the creditors. Acceptance will be presumed where it is shown that the assignment was for their benefit, and there is no stipulation for a release of the debts, nor anything calculated to delay the creditors unreasonably.[11] There are some cases,

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[1] Fellows v. The Vicksburgh Railroad and Banking Co. 6 Rob. 246.

[2] Duval v. Raisin, 7 Mo. 449; and see Major v. Hill, 13 Id. 247; Gale v. Mensing, 20 Id. 461; Hulse v. Marshall, 9 Mo. App. 148.

[3] Kalkman v. McElderry, 16 Md. 56.

[4] Hempstead v. Johnson, 18 Ark. 123. But where the assignment is on the condition that the assignor shall be released, assent will not be presumed. McCain v. Pickens, 32 Ark. 399.

[5] Hyde v. Olds, 12 Ohio St. 591. [6] Green v. Banks, 24 Tex. 508.

[7] See *ante*, p. 411, note 1.

[8] Sadlier v. Fallon, 4 R. I. 490; see Daniels v. Willard, 16 Pick. 36; Smith v. Millett, 11 R. I. 528.

[9] Leitensdorfer v. Webb, 1 N. Mex. 34.

[10] Robbins v. Magee, 76 Ind. 381; Paul v. Logansport Nat. Bank, 16 Id. 199; Eden v. Everson, 65 Id. 113.

[11] United States v. Bank of the United States, 8 Rob. (La.) 262; see 1 Am. Lead. Cas. 95; Klapp's Assignees v. Shirk, 13 Penn. St. 589.

however, in which the previous assent of creditors is expressly required. Thus, by a special provision, railroad and canal companies owing debts to contractors, laborers and workmen, are prohibited from making any assignment so as to defeat, postpone, or delay such creditors, without their *written assent first* had and obtained.[1]

In Massachusetts, an assignment is invalid, as respects attaching creditors, until one or more of the creditors of the assignor has assented to it, even where it is made for the benefit of all the creditors, without preferences, and contains no stipulation that the creditors should release their demands, or take upon themselves any onerous condition; and the assent of creditors will not be presumed.[2]

This rule appears to have been altered by the act of 1836,[3] since repealed.[4] Mr. Justice Wells, in a late case,[5] observes: "Independently of those laws (act of 1836), it has always been held that voluntary assignments by a debtor in trust for the payment of his debts, and without other adequate consideration, are invalid as against attachments, except so far as assented to by the creditors for whose benefit they were made. If assented to by creditors, such assignments are good at common law, and will protect the property or funds from attachment to the extent of the amount due to creditors thus assenting, unless by the con-

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[1] Resolution of January 21, 1843; Laws of 1843, p. 367; Dunl. L. p. 886, c. 572 [884, ed. 1853]; Purd. Dig. (ed. 1873), p. 90, pl. 1.

[2] Russell v. Woodward, 10 Pick. 408; Pierce v. O'Brien, 129 Mass. 314; Swan v. Crafts, 124 Id. 453; Widgery v. Haskell, 5 Id. 144, 154; Stevens v. Bell, 6 Id. 339, 342; Ingraham v. Geyer, 13 Id. 146; Marston v. Coburn, 17 Id. 454. See the opinion of Morton, J., in Fall River Iron Works Co. v. Croade, 15 Pick. 11, 15, 16; and in Everett v. Walcott, Id. 94, 97. And see the opinion of Shaw, C. J., in Burlock v. Taylor, 16 Id. 335, 339.

[3] Stats. of 1836, c. 238. The reason of this rule is explained to have been the want of a court of equity to enforce the trust in behalf of the creditors, and a doubt, or at least a difficulty, as to a remedy at law. Nelson, J., in Cunningham v. Freeborn, 11 Wend. 240, 248, 249; Parsons, C. J., in Widgery v. Haskell, 5 Mass. 154, and in Stevens v. Bell, 6 Id. 342. This difficulty was removed by the statute of 1836, which gave the creditors a remedy in equity against the trustee. Stat. of 1836, c. 238, § 7. See Dewey, J., in Shattuck v. Freeman, 1 Metc. 10, 13.

[4] Nat. Mech. & Trad. Bank v. Eagle Sugar Refinery, 109 Mass. 38.

[5] May v. Wannemacher, 111 Mass. 202; Pierce v. O'Brien, 129 Id. 314.

ditions of the assignment it is made to take effect only upon the assent of all or a prescribed number of creditors."

The assent of creditors will not be presumed on the ground that it is apparently for their interest, but must be shown by some form of adoption or affirmative acquiescence.

§ 286. *The English Rule.*—In England, it has been settled that the assent, or at least the privity, of creditors to an assignment in trust for their benefit, is essential to render it operative in their behalf. In the case of Smith v. Keating,[1] in the Exchequer Chamber, it was held that where a debtor conveys property in trust for creditors, to whom the conveyance is not communicated, and the creditors are not in any manner privy to it, the conveyance operates not as an assignment, but only as a power to the trustee, which is revocable by the debtor. The court say, it is the same as if the debtor had given money to an agent to pay his creditors, to whom no communication had been made.[2] This was substantially affirming the principle of the decisions in Wallwyn v. Coutts,[3] and Garrard v. Lord Lauderdale,[4] which have been so frequently cited and commented upon in our own courts.[5] Indeed, there is a class of cases, which establish the necessity of the creditors being actual parties to the deed, in order to render it anything more than a mere revocable deed of agency.[6] In Smith v. Keating, already cited, the court (Parke, B.) speak with doubt as to the sufficiency of a mere privity on the part of the creditors, as distinguished from

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[1] 6 M. Gr. & Scott, 136.

[2] The court rely on the case of Acton v Woodgate (2 Myl. & K. 492), and adopt the doctrine of Sir John Leach, as there laid down.

[3] 3 Merivale, 707. [4] 3 Simon, 1.

[5] By McCoun, V. C., in Cunningham v. Freeborn (1 Edw. Ch. 263); by Nelson, J., in the same case, on appeal (11 Wend. 249, 250); and at greater length by Ruffin, C. J., in Ingram v. Kirkpatrick (6 Ired. Ex. 462). In the last case, the doctrine of Wallwyn v. Coutts, is shown to have been inconsistent with earlier decisions in the English courts. See the remarks of Nelson, J., in the late case of the United Sates v. Hoyt (1 Blatchf. C. C. 332, 334); and those of Pearson, J., in Stimpson v. Fries, 2 Jones' Eq. 156. Mr. Justice Walker, in Gibson v. Rees, 50 Ill. 383.

[6] See *ante*, pp. 167, 168.

actual assent.[1] But in the later case of Sigers v. Evans,[2] the point seems to have been conceded. And in the same case, the general doctrine that a conveyance to trustees operates as a mere power, revocable by the debtor, until communicated to, or assented to by the creditors, was held not to apply to cases where the trustee himself takes a beneficial interest under the deed. In point of fact, the prevailing practice seems to have hitherto been for the creditors to give a positive assent to the conveyance.[3]

§ 287. Where the assignment is drawn with reference to the creditors becoming actual parties to it, as where it is in tripartite form, there must be an express assent on the part of the creditors, or some of them, in the mode prescribed; that is, by becoming parties to the deed, in order to render the instrument complete and operative.[4] Where the creditors are named in the assignment as parties, and they are required to execute it before they can take under its provisions, they must signify their assent in that mode, otherwise they cannot take under the instrument.[5] So, where the assignment itself is upon the express condition that a majority of the creditors shall sanction it, before it can take effect, such assent is necessary, and unless it be shown, the assignment will be set aside.[6]

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[1] 6 M. Gr. & Scott, 158.

[2] 32 Eng. L. & Eq. 139. And see Acton v. Woodgate, 2 Myl. & K. 492; Paige v. Broom, 4 Russ. 6.

[3] This appears from the cases of Estwick v. Caillaud (5 Term R. 420), and Ingliss v. Grant (Id. 530).

[4] See the opinion of Parker, C. J., in Hastings v. Baldwin, 17 Mass. 552, 556; Camp v. Mayer, 47 Ga. 414. In May v. Wannemacher (111 Mass. 202), Mr. Justice Wells said: "In cases of assignment by tripartite instrument, it is generally necessary that creditors should execute the instrument in order to give it full effect, because such is the intent with which it is made. But when this is not required by the form of the instrument of assignment, it is only necessary that creditors should give such assent to its provisions as will recognize and affirm the acceptance and possession of the property by the assignee as made and held for their benefit and in their behalf, in accordance with the terms of the assignment," citing Russell v. Woodward, 10 Pick. 408; Everett v. Wolcott, 15 Pick. 94; and see Gale v. Mensing, 20 Mo. 461; and see *ante*, p. 201.

[5] 2 Story's Eq. Jur. § 1036 a; Garrard v. Lord Lauderdale, 3 Sim. 1, cited ibid.; but see *ante*, p. 167.

[6] Lawrence v. Davis, 3 McLean, 177. See the opinion of McCoun, V. C., in Cunningham v. Freeborn, 1 Edw. Ch. 262.

So, where there are conditions in an assignment, as for instance, that the creditors shall release their debts, the presumption of assent does not arise, because it involves a question of discretion, upon which different minds may draw different conclusions.[1] So, where the assignment contains clauses restricting the rights of creditors or limiting the liability of the assignee.[2]

Where an assignment is made with preferences to certain creditors, and the preferences are given unconditionally, their assent will be presumed.[3] So, where the preferred creditors are to be paid in full.[4]

§ 288. *Assent to Assignments Directly to Creditors.*— Where the assignment is *directly* to the creditors, their assent is always required to give it validity, on the ground that it requires the agreement of two parties to make a contract.[5] In making an assignment of property, as in every other case of contract, the assent of at least two persons is necessary to its validity. A debtor cannot change his relations to his creditors, by a voluntary assignment of his property to them. If, therefore, he makes an assignment, and his creditors do not accept it, there is no change of property, and legal redress is open to the creditors as before the attempted assignment.[6]

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[1] Story, J., in Halsey v. Whitney, 4 Mason, 206, 215; Swearingen v. Slicer, 5 Mo. 241; Wakeman v. Grover, 4 Paige, 23.

[2] "No assent can be presumed when the assignment requires that the creditors shall give to the debtor a credit for the balance that remains due after the proceeds are distributed (Todd v. Bucknam, 11 Me. 41; Elmes v. Sutherland, 7 Ala. 262), or where the majority of the creditors are to have the power to fix the time for the sale of the property (Shearer v. Loftin, 26 Ala. 703), or where the assignee is disqualified (Spinney v. Portsmouth Co. 25 N. H. 9), or where the liability of the assignee is limited to actual receipts or willful defaults (Brown v. Warren, 43 Id. 430; Spinney v. Portsmouth Co. 25 Id. 9), or where the assignees are not to be responsible for the neglect of each other (Spinney v. Portsmouth Co. 25 Id. 9)." Bump on Fraud. Conv. p. 341.

[3] Wheeler v. Sumner, 4 Mason, 183; Ward v. Lewis, 4 Pick. 518; Brown v. Lyon, 17 Ala. 659.

[4] New England Bank v. Lewis, 8 Pick. 113; Deforest v. Bacon, 2 Conn. 633; North v. Turner, 9 S. & R. 244; Copeland v. Weld, 8 Greenl. 411; Reinhard v. Bank of Kentucky, 6 B. Mon. 252.

[5] Nicoll v. Mumford, 4 Johns. Ch. 422, 529; Cunningham v. Freeborn, 11 Wend. 240, 248, 249; Jones v. Dougherty, 10 Ga. 273; Lawrence v. Davis, 3 McLean, 177; 2 Kent's Com. [533] 692, note.

[6] McLean, J., in Lawrence v. Davis, 3 McLean, 177.

§ 289. *Assent, how and when Given.*—The assent of the creditors may be given, either by becoming parties to, and signing the instrument of assignment, where it requires such signature,[1] or by signing an acceptance appended to it,[2] or by verbally assenting to it, in terms,[3] or by actually receiving the benefit of it,[4] or by claiming such benefit,[5] or by taking legal measures to obtain such benefit.[6] Where signature is required, it is not essential to the validity of the assignment that the creditors should sign at the time of execution by the other parties. It is sufficient, except against intervening attaching creditors, if this is done afterwards,[7] and within the time limited for that purpose, by statute, or by the assignment itself.[8] Where a specific time is prescribed for the creditors to come in and assent to the assignment, as parties thereto, or otherwise, they must comply strictly with the condition, or they will be excluded from the benefit of the trust; unless, indeed, by reason of absence from the country or some other cause, any creditor has not, within the time prescribed, had any knowledge of the existence of the assignment.[9]

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[1] See *ante*, p. 167.

[2] See Bank of Bellows Falls v. Deming, 17 Vt. 366.

[3] Wiley v. Collins, 11 Me. 193; Brooks v. Marbury, 11 Wheat. 78. Mere inquiry on the part of a creditor to ascertain whether it would be profitable for him to accept an assignment as valid is not equivalent to inducing others to act upon it. Hubbard v. McNaughton, 43 Mich. 220.

[4] Brooks v. Marbury, *ubi supra*; Brown v. Minturn, 2 Gall. 557. In Scott v. Edes, 8 Minn. 387, the court said: "That the acceptance of dividends under the assignment is an assent to and confirmation of such assignment by the creditor has been uniformly held. A judgment lien creditor who accepts a dividend with other creditors under an assignment, thereby affirms the deed, and cannot afterwards enforce his judgment against property embraced in the deed of assignment." Moule v. Buchanan, 11 Gill & J. 314; Lanahan v. Latrobe, 7 Md. 268; see Haskins v. Olcott, 13 Ohio St. 211; Frierson v. Branch, 30 Ark. 453; Chafee v. Fourth Nat. Bank, 71 Me. 514.

[5] Garland, J., in United States v. Bank of the United States, 8 Rob. (La.) 262, 412; May v. Wannemacher, 111 Mass. 202; Pierce v. O'Brien, 129 Id. 314.

[6] See United States v. Hoyt, 1 Blatchf. C. C. 332; Zaring v. Cox, 78 Ky. (1 Rod.) 527.

[7] Halsey v. Whitney, 4 Mason, 206, 215; Wheeler v. Sumner, Id. 183; Ward v. Lamson, 6 Pick. 358.

[8] Phœnix Bank v. Sullivan, 9 Pick. 410.

[9] Phœnix Bank v. Sullivan, 9 Pick. 410; De Caters v. Le Ray De Chaumont, 2 Paige, 490; Raworth v. Parker, 2 K. & J. 163; Nicholson v. Tutin, 2 Id. 18; see Broadbent v. Thornton, 4 De G. & S. 65.

And a creditor may lawfully qualify his assent by limiting his signature to a part of his demands, and excepting the others from its operation.[1] In Alabama, it has been held that a deed of assignment which devotes the property unconditionally to the payment of debts of the preferred creditors is complete and executed, as to them, immediately upon its delivery, notwithstanding it requires the rest of the grantor's creditors to execute it within six months, as a condition to their participation in the residue.[2]

In a case in Massachusetts, where a debtor, before executing a bipartite deed of assignment in trust, called on one of his creditors to prevent his being surprised that he was about assigning his property, proposed the making of such assignment and showed him a sketch of the mode in which the proceeds of the property were to be appropriated; and this sketch, so far as it regarded the creditor, was in substance made part of the deed; it was held that as against an attaching creditor, this was not a sufficient assent to the assignment, although the other creditor was preferred therein.[3] In a case in Arkansas, where a proposition was made by a debtor to his creditors, to secure their debts by a deed of trust on time, with specified provisions; and the creditors assented, provided the provisions of the deed were satisfactorily arranged; and they required an early answer, and no answer was given, but a deed of trust was executed three months afterwards, with provisions in it materially different from those proposed; it was held that the creditors were not bound to accept the deed.[4]

§ 290. *Assent of how many Creditors.*—Where the assent of creditors is required by law, or by the form of the assignment itself (as where it is drawn with reference to being executed by them), it is not necessary that *all* should assent, in order to make the instrument valid and operative,

[1] Deering v. Cox, 6 Me. 404.
[2] Brown v. Lyon, 17 Ala. 659.
[3] Fall River Iron Works Company v. Croade, 15 Pick. 11.
[4] Rapley v. Cummins, 11 Ark. 689.

unless there is some provision in the deed, or some settled collateral agreement, that it shall be void unless all assent.[1] Thus, in Massachusetts, in the case of Hastings v. Baldwin,[2] the execution of the assignment by a single creditor, and he also being the assignee, was held sufficient to render the deed complete and operative. The rule, indeed, in that State, prior to the statute of 1836, and since its repeal, was and is that the creditors must assent in sufficient numbers and value to cover the property assigned, otherwise the consideration might be deemed inadequate and void as to the non-assenting creditors, though good as to those assenting.[3] In Alabama, it has been declared, as the general doctrine on this point, that where a debtor seeks to postpone the payment of his debts, by conveying property in trust to secure or pay them, *all* the creditors must assent to the deed to give it any validity.[4] But where the deed is beneficial to them, and does not delay them in the collection of their debts, the assent of a creditor will be sufficient to uphold the assignment for his benefit, though other creditors refuse to participate in the deed.[5]

In Nevada,[6] all the creditors need not assent if the amount of the debts exceed the value of the property. The assent of those representing debts equal to the value of the property assigned, is a valid consideration, and gives full legal effect

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[1] Story, J., in Halsey v. Whitney, 215, 231. Where an agreement was made whereby a debtor was to convey property to a trustee for the benefit of creditors named in a schedule contained therein, the same to be signed by all the creditors, in order to be binding, it was held that if one of said creditors refused to sign, the purchase of his claim by another of said creditors and the signing of the agreement by him would be equally effective. Towne v. Rublee, 51 Vt. 62.

Non-assenting creditors, not present when the deed was executed, are in no way bound by the agreement of the assenting creditors to the release of a portion of their debts in an assignment made by the debtor for their benefit. Seale v. Vaiden, 10 Fed. Reptr. 831.

[2] 17 Mass. 556.

[3] Woodward, J., in Adams v. Blodgett, 2 Woodb. & Minot, 237; Russell v. Woodward, 10 Pick. 408; Morton, J., in Fall River Iron Works Co. v. Croade, 15 Id. 11, 15, 16; and in Everett v. Walcott, Id. 94, 97; May v. Wannemacher, 111 Mass. 202.

[4] Rankin v. Lodor, 21 Ala. 380, 390.

[5] Mauldin v. Armistead, 14 Ala. 702; and see Shearer v. Loftin, 26 Id. 703.

[6] Sadler v. Immel, 15 Nev. 265.

to an assignment; and if their debts are of less amount than the property, they constitute a good consideration *pro tanto*, and give the assignees a right to retain property to the amount of such debts.

§ 291. *Assent by Attorney.*—The assent of creditors to a deed of trust made by their debtor for their benefit, may be given by the attorney holding their claims; and it will be presumed that where one undertakes to act as attorney, and does so act, he is duly authorized.[1] And if the act be not within the scope of his authority, it may be inferred that they sanctioned what was thus for their benefit.[2] But if an attorney on behalf of his client, but without his authority, executes an assignment, it will bind the former but not the latter.[3] It is otherwise, if the client has given an authority.[4]

§ 292. *Assent by Partners.*—If one of several partners who are creditors, sign and seal an assignment in the name of the firm, with a single seal, it is good, and binds all the partners who are present or assent to the execution. If none but the executing partner assent, it is still valid to release the debt, and bind in this respect the rights of the firm.[5]

§ 293. *Limitation of Time to Assent.*—The assent to an assignment requiring a release cannot be given after the time limited by the assignor has expired, provided the creditor has had seasonable notice of the assignment, or provided proper means have been taken to give the notice.[6] Being thus pre-

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[1] Hatch v. Smith, 5 Mass. 53.

[2] Vernon v. Morton, 8 Dana, 247.

[3] Hatch v. Smith, 5 Mass. 42, 51; Parrot v. Wells, 2 Vern. 127; Johnson v. Ogilby, 3 P. Wms. 277.

[4] Hatch v. Smith, *ubi supra;* Johnson v. Ogilby, *ubi supra.*

[5] Story, J., in Halsey v. Whitney, 4 Mason, 206, 232; see Pierson v. Hooker, 3 Johns. 68; Mackay v. Bloodgood, 9 Id. 285; Bulkley v. Dayton, 14 Id. 387; Bruen v. Marquand, 17 Id. 58; McBride v. Hagan, 1 Wend. 326; Salmon v. Davis, 4 Binn. 375; Emerson v. Knower, 8 Pick. 63; Ball v. Dunsterville, 4 Term R. 313.

[6] Phœnix Bank v. Sullivan, 9 Pick. 410; see Raworth v. Parker, 2 K. & J., 163; Dews v. Olwill, 3 Baxter (Tenn.), 432. Where an assignment provided that creditors should release within a specified time, and that the shares of those who did not release should be paid back to the assignor, it was held that the assignee could not be garnished for the share of a creditor who did not accept the terms

cluded from any participation in the fund, the creditor's only claim is upon the surplus reserved to the debtor, if any should remain after satisfying the debts of the creditors who accept their proportion of the trust fund upon the terms proposed.[1]

§ 294. *Presumption of Assent from Lapse of Time.*—The acceptance of the trust by the trustees of a debtor, and the acquiescence of the creditors for more than twenty years, has been held to afford presumptive evidence in favor of their assent;[2] at least where the question of assent is not made a subject of direct inquiry by the pleadings in an action brought in their behalf.[3]

§ 295. *Assent to Void Assignment.*—The assent of creditors will sometimes have the effect of giving validity to a void assignment. Thus, in a case in Vermont, it has been held that an assignment which is void or inoperative under the act of 1843, declaring certain general assignments void, will, if assented to by the creditors, become operative and binding upon them.[4] The court (Redfield, Ch. J.), in giving their opinion in this case, say: "It is obvious, if all the creditors assent, the defect is cured. * * * And if the assent of all makes it binding, it is difficult to see why

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of the assignment before the service of the writ on the assignee. Smith v. Millett, 11 R. I. 528.

[1] De Caters v. Le Ray De Chaumont, 2 Paige, 490. But acceptance may be waived by the grantor. Bank v. Partee, 99 U. S. 325.

[2] Burke's Estate, 11 Par. Sel. Cas. (Penn.) 470. Where the assignment provided for the distribution of the property among such creditors as should execute it before a specified day—held that where the parties assumed to act under the instrument, although it was not actually executed by the creditors, the creditors might maintain an action after the expiration of fifteen years, to have the trust enforced. Nicholson v. Tutin, 2 K. & J. 18. But where the creditors, for whose benefit an assignment was made, remained inactive for eight years thereafter, and the trust was then revoked by an arrangement between the debtor grantor, and the trustee, and such creditors continued to remain inactive for nearly thirteen years after the revocation, it was held that such prolonged inaction would overcome all presumption of assent to the terms of the assignment on the part of the creditors, and the revocation of the trust will be sustained so as to preclude the creditors or their assignees from afterwards asserting any claim under the trust. Gibson v. Rees, 50 Ill. 383.

[3] Brashear v. West, 7 Pet. 608; and see Major v. Hill, 13 Mo. 247.

[4] Merrill v. Englesby, 28 Vt. 150.

the assent of any less number must not have the same effect, as to them. And this making it binding upon these creditors, it is binding upon the other creditors, if it be such a disposition of the effects as the creditor has a right to make."[1] But in Indiana it has been held that the assent of part of the creditors to an assignment of personal property which is fraudulent as between the debtor and the assignees, the creditors having an opportunity to observe the suspicious nature of the transaction, does not purge the contract of fraud, even as to them, and the fraud pervades and vitiates the whole assignment.[2] And in a case in the Circuit Court for the District of Rhode Island, where a fraudulent assignment had been assented to by certain creditors, after attachments by other creditors, it was held that such assent could not purge the fraud, nor render the deed valid as against the attachments; and that the assignment being actually, and not merely constructively fraudulent, it was wholly void, and could not be allowed to stand as a security to a third person who had assented to it, with notice of the fraud, or of such facts as were sufficient to put him on inquiry, and enable him to learn the existence of the fraud.[3]

Where creditors have assented to an assignment by knowingly receiving payments or dividends under it, they cannot then repudiate it and attach the property assigned. An exception, however, exists where an assignment is declared void by the law of the place where it is made. If it is absolutely void by such law no assent or ratification of creditors can make it valid; but if it is only void at the election of such creditors as choose to avoid it, and they assent to it or ratify it by accepting dividends under it, then as to such

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[1] Merrill v. Englesby, 28 Vt. 157; see also White v. Banks, 21 Ala. 705; Geisse v. Beall, 3 Wis. 307.

[2] Caldwell v. Williams, 1 Ind. 405. In Eden v. Everson (65 Id. 113) it was held that an assignment was not binding upon an execution creditor, even though after it was made he had verbally assented thereto; no property passes until the deed has been filed and recorded as required by the statute.

[3] Stewart v. Spencer, 1 Curt. 167. The learned judge cites Boyd v. Dunlop, 1 Johns. Ch. 482; Harris v. Sumner, 2 Pick. 129; Halsey v. Whitney, 4 Mason, 218.

assenting or ratifying creditors the assignment will be sustained.[1]

Assent of creditors to a void assignment must be actually given, however, and will not be presumed. In the case last cited, Mr. Justice Curtis declared himself not prepared to hold that the assent of creditors to a void deed is to be presumed, because the whole foundation for the presumption fails.[2] The law cannot deem such a deed beneficial to the third party. Upon the assumption that the deed is valid upon its face, and is rendered void only by extraneous facts, the assent of creditors is still not to be presumed, because "the presumption of assent is not founded on the face of the instrument, but in the nature and circumstances of the entire case."[3] Nor will such an assent be presumed to the prejudice of the just rights of third persons; a legal fiction is not to be permitted so to operate. *In fictione juris semper æquitas existit.*

A creditor is not precluded by taking under the assignment from showing fraud and collusion as to such debts secured by the assignment as may stand in his way or prejudice him by being paid.[4]

A consent of creditors without full knowledge of all the material facts is not binding upon them so as to prevent them from bringing an action to set aside the assignment for fraud.[5]

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[1] Chafee v. Fourth Nat. Bank, 71 Me. 514. In this case the assignment was valid by the law of the place where made, and not absolutely void by the law of Maine. Non-resident creditors were there bound by it. Resident creditors might there avoid it. But if instead of electing to do so, they assented and accepted payment, thereby secured to them, then their right to treat the assignment as void was held to be extinguished.

[2] 1 Curt. 167.

[3] The learned judge quotes Hosmer, C. J., in Camp v. Camp, 5 Conn. 309.

[4] Mackintosh v. Corner, 33 Md. 598; Reiff v. Eshleman, 52 Id. 582.

[5] Hairgrove v. Millington, 8 Kans. 780.

CHAPTER XXI.

TIME WHEN THE ASSIGNMENT TAKES EFFECT.

§ 296. The assignment having been completed by the formal acts which have just been considered, is in a state to be immediately acted under by the assignee, in *execution of the trust* created by it.

An assignment to a trustee for creditors, where it is delivered by the assignor into the hands of the assignee, and is at once accepted by the latter, becomes immediately operative, and takes full effect as a transfer of the property.[1] But where an interval elapses between actual delivery to the assignee, and his acceptance, the assignment will be held to take effect, as against creditors, only from the time of acceptance. Thus, where the deed was placed in the hands of the assignee, who hesitated to accept, for six hours, and then claimed the property, but before he concluded to accept, the property was levied upon by virtue of executions against the assignors; it was held that the judgment creditors had obtained a lien upon the goods, and were entitled to have their debts satisfied, in preference to the debts of the creditors provided for by the assignment.[2]

Where the assignee or trustee is not present, and an interval necessarily elapses between the time of delivery of the instrument and its actual receipt, the deed will be held to take effect as a transfer of the property, as against creditors, from the time of the first delivery by the assignor or grantor subject to being defeated by the dissent or refusal of the

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[1] Read v. Robinson, 6 Watts & Serg. 329, 332; Wilson v. Pearson, 20 Ill. 81; Bell, J., in Seal v. Duffy, 4 Barr, 274, 276, 277; Klapp's Assignees v. Shirk, 13 Penn. St. 589; see Brooks v. Marbury, 11 Wheat. 78, cited by Curtis, J., in Stewart v. Spencer, 1 Curt. 157, 166. The deed of assignment takes effect from its delivery, and not before. Walker v. Newlin, 22 Kans. 106; Thatcher v. Franklin, 37 Id. 64.

[2] Crosby v. Hillyer, 24 Wend. 280; see *ante*, Chap. XVIII.

trustee; and the assent of the latter may be presumed in the first instance, for the purpose of giving operation to the deed.[1] So, where the assignment was in the form of a letter assigning personal property to an absent creditor, for the indemnity of himself, or of himself and others, and sent by mail, it was held, in South Carolina, to take effect from its date.[2] In Pennsylvania, the act of May 3, 1855, providing for the recording of assignments by non-residents of the State, declares that every such assignment may take effect from its date; provided that no *bona fide* purchaser, mortgagee or creditor having a lien on the property assigned before the recording, and not having had previous actual notice thereof, shall be affected or prejudiced.[3]

§ 297. Where assignments are required to be recorded, as in Virginia, North Carolina, and Mississippi, they take effect from the time of their delivery to the clerk for that purpose.[4]

In a case in Maine, where a general assignment of property was made, and a week afterwards an agreement was indorsed thereon, with consent of all those concerned, according to the original intention, giving priority to a large debt due to the United States, the assignment was held to take effect from the first date, unaffected by any intervening events.[5] In the same State, the statute of 1836, c. 240, concerning assignments, was held to protect property assigned, from attachment, from the time when the assignment was made, and before notice given, if notice were afterwards

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[1] Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; Wilt v. Franklin, 1 Binn. 502; McKinney v. Rhoads, 5 Watts, 343; Read v. Robinson, 6 Watts & Serg. 329; and see Moore v. Collins, 3 Dev. 126; Ward v. Lewis, 4 Pick. 518; Merrils v. Swift, 18 Conn. 257; Greene v. Mowry, 2 Bailey (S. Ca.), 163; West v. Tupper, 1 Id. 193; 1 Am. Lead. Cas. 96; see Johnson v. Sharp, 31 Ohio St. 611, given *ante*, p. 376.

[2] Dargan v. Richardson, Cheves' L. 197; Shubar v. Winding, Id. 218.

[3] Laws of 1855, p. 415; Purdon's Dig. (ed. 1857), p. 1112; see Boyer's Estate, 51 Penn. St. 432; Marks' Appeal, 85 Id. 231.

[4] 1 Tucker's Com. [269] 261; see Burgin v. Burgin, 1 Ired. L. 453; Hutchinson's Code (Miss.), 606, § 5; Henderson v. Downing, 24 Miss. 114.

[5] Fox v. Adams, 5 Greenl. 245.

given according to the requirements of the statute.[1] And where an assignment under that statute included bank stock, and notice was given to the bank, it was held that the property did not pass until the entry on the books of the bank required by the statute of 1838, c. 325, was made, and that an intervening attachment made at the suit of the bank was valid against the assignment.[2]

An assignment of all the assignor's choses in action, property, and effects, passes a present interest in them, although it contains a clause to the effect that an inventory of the property is to be made out by the assignor, and annexed to, and taken as part of, the assignment; and the assignee may compel a discovery and surrender of the property.[3]

In Alabama, an assignment devoting the assigned property unconditionally to the payment of the debts of the preferred creditors, is complete and executed, as to them, immediately upon its delivery, notwithstanding it requires the rest of the grantor's creditors to execute it within six months, as a condition to their participation in the residue.[4]

In Arkansas,[5] where a statute requires the assignee to file an inventory and give a bond, it is held that these requisites are conditions subsequent and not precedent to the vesting of title in the assignee; that title vests in him upon the execution and delivery of the deed, so as to defeat an execution.

Under the Indiana Act[6] no assignment conveys any interest in the property until the deed is recorded.

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[1] Fiske v. Carr, 20 Me. 301.

[2] Id.

[3] Keyes v. Brush, 2 Paige, 311.

[4] Brown v. Lyon, 17 Ala. 659. But when the balance was to be distributed among non-preferred creditors, provided they would release the debtor, it was held that such an assignment would not prevail against a levy of an attachment made before the assignee took possession of the property levied on. Hughes v. Ellison, 5 Mo. 463.

[5] Clayton v. Johnson, 36 Ark. 406.

[6] R. S. of Ind. (1881), § 2663.

CHAPTER XXII.

OPERATION OF AN ASSIGNMENT.

§ 298. It has already been seen that an assignment in trust for the benefit of creditors, when once accepted by the assignee, operates as a *conveyance* and not as a mere *power*;[1] and cannot be revoked by the assignor,[2] or defeated by the renunciation of the assignee.[3] A deed conveying property in trust, absolutely, for the benefit of specified creditors, if *bona fide*, is valid as a conveyance, in consequence of the presumed assent of the creditors, and is not a mere power subject to be defeated by the levy of an execution at the instance of one of the creditors named in it.[4] It operates to divest the debtor of his entire estate and interest in the property assigned, so that he cannot convey or incumber it by mortgage as against the creditors, and he retains nothing except the equitable and incidental right to discharge the trusts by payment of the debts before sale, and thus entitle himself to a reconveyance of the whole estate, or to claim a reconveyance of the residue remaining unsold after the debts are discharged, or payment of the residue of the proceeds of the sales.[5] It

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[1] Dwight v. Overton, 35 Tex. 390.

[2] Hall v. Denison, 17 Vt. 310; Ingram v. Kirkpatrick, 6 Ired. Eq. 462; Sevier v. McWhorter, 27 Miss. 442. As to revocation, see *post*, Chapter XXVII.

[3] Seal v. Duffy, 4 Barr, 274. As to amendments to assignments, see *ante*, Chapter XVII.

[4] Kinnard v. Thompson, 12 Ala 417.

[5] Briggs v. Palmer, 20 Barb. 392; Johnson, J., Id. 405; Pettit v. Johnson, 15 Ark. 55; and see Klapp's Assignees v. Shirk, 13 Penn. St. 589; Weide v. Porter, 22 Minn. 423. The grantor in a deed of trust to secure the payment of debts has no such interest in the property (while the deed is in full force), as is the subject of execution at law, or of attachment or garnishment. The whole title to the property is the trustee. Cornish v. Dews, 18 Ark. 172; Pettit v. Johnson, 15 Id. 55; Biscoe v. Royston, 18 Id. 509; Schlueter v. Raymond, 7 Neb. 281; Case v. Ingersoll, 7 Kans 367; Harrison v. Farmers' Bank, 7 W. Va. 424; Smith v. Millett, 11 R. I. 528. Thus it is held that if a debtor who has previously conveyed to trustees for the benefit of creditors, afterward conveys to one of the

operates to create at once the relation of trustee and *cestui que trust* between the assignee and the creditors,[1] and gives the latter the right to enforce its provisions, even though it be made without their knowledge or privity.[2] It operates also as a quit-claim of the assignor's interest in the property conveyed, in the same plight and condition as he himself held it, and will not defeat pre-existing liens, nor can the trustees be regarded as purchasers, nor the *cestuis que trust* as creditors, within the registry acts.[3] But it will not operate to defeat the right of creditors to set aside a previous fraudulent sale and transfer of his property by the debtor, whether it be for the benefit of preferred creditors, or of all the creditors equally.[4]

In Pennsylvania, by the effect of the act of June 14, 1836, an assignment duly recorded is said to stand upon the footing of a transfer by law, because, as the act gives the creditors a right to have the trust that is expressed in the

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trustees the same land, such trustee would take subject to the assignment and the creditors would not be prejudiced thereby. Hatchers v. Winters, 71 Mo. 30. Money due the assignor who is a defendant in attachment cannot be reached after assignment by garnishment at the suit of an individual creditor. Dehner v. Helmbacher Mills, 7 Ill. App. (Bradw.) 47. To reach the grantor's interest, it seems that the proper course for the judgment creditor to pursue would be to file a bill against the grantor, trustee and *cestui que trust*, praying an account upon the balance due upon the trust debts, and a decree that the trust be closed, and the property subjected first to the discharge of such balance, and the excess to the satisfaction of the complainants's debt. Cornish v. Dews, *supra*. After an assignment the assignor ceases to have any legal title to the property assigned, and his equitable interest is confined to such *residuum* of the estate as may remain after all the debts directed to be paid have been satisfied. He remains liable as before for all his unpaid debts, and subject to legal process. Butler v. Thompson, 4 Abb. N. C. 290. In Delaware, etc. Co. v. Scranton (34 N. J. Eq. 429), where the owner of the equity of redemption in mortgaged land had assigned, it was held that he retained such an interest that he might apply to set aside a sale of the lands under foreclosure notwithstanding the assignment.

[1] Hall v. Denison, 17 Vt. 310; Ingram v. Kirkpatrick, 6 Ired. Eq. 462.

[2] Id. ibid.

[3] Walker v. Miller, 11 Ala. 1067. Where the lien of an execution has attached, or the writ in replevin has issued, the debtor's assignment cannot defeat the plaintiff's right of recovery. Marsh v. Vawter, 71 Ind. 22; Collier v. Bickley, 33 Ohio St. 523; see Miller v. O'Bannon, 4 Lea (Tenn.), 398. So where the lien of a *fi. fa.* was lost by an abandonment of the levy, the rights of an intervening assignee attached and there could be no valid levy under the alias *fi. fa.* upon the assigned property. Missimer v. Ebersole, 87 Penn. St. 109.

[4] Brownell v. Curtis, 10 Paige, 210; Browning v. Hart, 6 Barb. S. C. 91; Leach v. Kelsey, 7 Id. 466.

deed executed for their benefit by the court, the whole trust becomes vested in them in equity, under the immediate administration of the court; and therefore an assignment recorded is, in effect, a transfer to the creditors by the act of law.[1]

An assignment does not operate as an acknowledgment or promise, which is evidence of a new or continuing contract whereby a case is taken out of the statute of limitations.[2]

Where a debtor deposited money in a bank for the payment of a creditor without the knowledge or assent of the latter, and subsequently on the same day made an assignment, it was held that the assignment operated as a revocation of the debtor's intention of paying the particular creditor, being inconsistent with such intention.[3]

In cases free from fraud, assignments usually operate according to their precise tenor and purport, and to the intention of the assignors in making them.[4] But a different or contrary operation is sometimes given to them by statute. Thus, in some States where preferences to creditors in general assignments are prohibited, they are declared to operate and inure to the equal benefit of all the creditors, although preferences have been expressly given by them.

§ 299. *Effect on Corporation.*—It seems to have been formerly doubted whether a general assignment by a corporation, of all its property, did not operate as a dissolution of the corporation, and an extinguishment of its corporate existence. This view was taken by Mr. Justice Story.[5] But the better opinion now seems to be that

[1] 1 Smith's Lead. Cas. (Am ed. 1852), 70, 71; Id. (ed. 1855), 75.

[2] Niblack v. Goodman, 67 Ind. 174.

[3] Simonton v. First Nat. Bank, 24 Minn. 216; see Coots v. McConnell, 39 Mich. 742.

[4] See Hollins v. Mayer, 8 Md. Ch. Dec. 343; Myers's Appeal, 78 Penn. St. 452.

[5] Dissenting, in Beaston v. The Farmers' Bank of Delaware, 12 Pet. 138. The learned judge's remarks are in these words: "But I must say that, independent of some special and positive law or provision in its charter to such an effect, I do exceedingly doubt if any corporation, at least without the express assent of

such an assignment does not operate, *per se*, as a dissolution, or surrender of its franchises;[1] nor does it operate as a transfer of these franchises to the grantees,[2] the power of alienation not extending to that subject.[3] In a case in New York, it was held that although a corporation can make a voluntary assignment, it cannot transfer to the assignee the power of its officers; that the assignment transfers the assets merely, not the franchise; and that the assignee does not, by accepting the assignment, become the corporation, nor acquire the powers which the statute confers upon the corporate body and its officers.[4] It was further held that the corporation is not dissolved by the act of assignment, but that the corporation and its officers remain, with all the powers with which the statute has clothed them, the same after the assignment as before.[5] In Pennsylvania, it is provided by the statute relating to assignments by banks in certain cases,[6] that the corporate powers of the bank shall, after the making of the assignment, cease and determine, except so far as may be necessary for the

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all the corporators, can rightfully dispose of all its property by such a general assignment, so as to render itself incapable, in future, of performing any of its corporate functions. That would be to say that a majority of a corporation had a right to extinguish the corporation by its own will, and at its own pleasure. I doubt that right, at least unless under very special circumstances." It will be seen on a former page (pp. 104, 121), that the power of a single partner to make a general assignment of the partnership property, has been objected to, on the similar ground of its producing a dissolution of the partnership. But this view was expressly combated by Chief Justice Marshall, in Anderson v. Tompkins, 1 Brock. 461.

[1] Town v. Bank of River Raisin, 2 Dougl. (Mich.) 530; Parsons v. Powder Works, 48 N. H. 66; Germantown Pass. R. Co. v. Fitler, 60 Penn. St. 125; Angel & A. on Corp. p. 808.

[2] De Ruyter v. St. Peter's Church, 3 N. Y. 238; Hurlbut v. Carter, 21 Barb. 221; see Germantown Pass. R. Co. v. Fitler, 60 Penn. St. 125; Ohio Life Ins. Co. v. Merchants' Ins. Co. 11 Humph. (Tenn.) 1.

[3] It is sometimes the practice to reserve to the corporation, by the terms of the assignment, the franchises, rights, and powers necessary to their corporate existence. This was done in the assignment mentioned in Bowen v. Lease, 5 Hill, 221, 222.

[4] Hurlbut v. Carter, 21 Barb. 221, 224. [5] Id. ibid.

[6] Act of April 16, 1850, § 27; Purdon's Dig. (10th ed. Brightley), p. 144. The powers and duties of the officers of an insolvent bank cease when it makes an assignment; thereafter they may buy up outstanding claims against it if they do so fairly and honestly. Craig's Appeal, 92 Penn. St. 396; see also under this statute Shryock v. Bashore, 82 Penn. St. 159; Ahl v. Rhoads, 84 Id. 319.

following purposes, to wit: 1, for the purpose of suing and being sued, and for continuing all suits and proceedings at law or in equity, pending for or against the bank; 2, for the purpose of making such assurances, conveyances, and transfers, and doing all such acts, matters, and things, as may be necessary or expedient to make the said assignments or the trusts thereof effectual; 3, for the purpose of citing the trustees to account, and compelling them to execute the trusts; 4, for the choosing of directors for the purpose of receiving and distributing among the stockholders of the bank, such surplus as shall remain after discharging all the debts of the bank. It has been held in Arkansas, that a general assignment by a bank, though in itself valid, was a good cause of forfeiture of its charter.[1]

§ 300. *Effect on Partnership.*—An assignment by an insolvent firm, of all its assets for creditors, necessarily works a dissolution of the partnership, where no provision is made to continue the business.[2] So an assignment by one partner, of all his interest in the firm property, to the other partner or partners, works a dissolution of the firm.[3]

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[1] The State v. The Real Estate Bank, 5 Pike, 595; cited, with approval, by Johnson, J., in Hurlbut v. Carter, 21 Barb. 224.

[2] McKelvy v. Blair, Am. L. T. vol. VI, p. 65; Brown v. Agnew, 6 W. & S. 238; Gordon v. Freeman, 11 Ill. 14; Parsons on Part. 400.

[3] Horton's Appeal, 18 Penn. St. 617; see *ante*, p. 126; Parsons on Part. 400.

CHAPTER XXIII.

THE LEX LOCI IN ITS APPLICATION TO ASSIGNMENTS.

§ 301. It frequently happens that among the property intended to be conveyed by an assignment for the benefit of creditors, is comprised property in other States, or debts due from citizens of other States; and it becomes an important subject of inquiry, how far the assignment will operate to transfer such property, or protect it from the local remedies of creditors.

Three different systems of laws may be applied to the determination of questions which thus arise, namely, the law of the place where the litigation is had, the law of the place where the property is situated, and the law of the place where the assignment is made, which are designated in the books, respectively, as the *lex fori*, *lex rei sitæ*, and *lex loci contractus*.

§ 302. *The General Rule.*—With regard to all contracts of which the subject-matter is personal property, it may be laid down as a broad general proposition, subject however to numerous qualifications, that their validity is to be tested by the law of the place where the contract is made. If valid there, they will be everywhere sustained, and foreign tribunals on principles of international and interstate comity will, in determining their force and sufficiency, regard them in the light of the law where they were made.[1]

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[1] Thus, in The Baltimore & Ohio R. R. Co. v. Glenn (28 Md. 287), a very carefully argued and adjudged case, an assignment executed by a Virginia corporation in the State of Virginia, but containing reservations which would render it invalid under the laws of the State of Maryland, was sustained by the courts of the latter State. Mr. Justice Stewart, in delivering the opinion of the Supreme Court, said: "The deed in question having been made in the State of Virginia, and by a corporation created by the laws of that State, its validity must depend upon those laws. It is a general principle, admitting of few exceptions, that in construing contracts made in a foreign country, the courts are governed by the

On this principle, a voluntary assignment in one State, valid by the laws of that State, would operate to convey personal property (not already subject to liens) in every State where it might be found.[1] In Caskie v. Webster,[2] it was expressly held by the Circuit Court of the United States for the third circuit, that a general voluntary assignment, valid by the laws of one of the United States—though assumed to be void if it had been made in another—will carry property in that other, against an attaching creditor there. And in the Pennsylvania case of Law v. Mills,[3] it was decided that the validity of a voluntary assignment of personal property in trust for creditors depends on the law of the place where it is made; and that if made in New York, and valid by the laws of that State, it will pass the property in Pennsylvania described in it.

So also in Kelstadt v. Reilly,[4] it was held that a voluntary assignment made in Ohio under the law of that State, but not an insolvent law, of personal property in New York, gave to the assignee a title superior to that of a subsequent attaching creditor of the property in New York.

Mr. Chief Justice Green, in Frazier v. Fredericks,[5] remarks: "The general principle is fully and unequivocally settled, that personal property is transferable according to the law of the country where the owner is domiciled. A trans-

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lex loci as to the essence of the contract; that is the rights acquired and the obligations created by it;" citing De Sobry v. De Laistre, 2 Har. & J. 191; Washer v. Everhart, 3 Gill & J. 244; Hall v. Mullen, 5 Har. & J. 198; and see Hanford v. Paine, 32 Vt. 442; Guillander v. Howell, 6 Am. Law Reg. 522, note, where the cases are reviewed; see also Moore v. Willett, 35 Barb. 668.

[1] Story's Confl. L. § 423 a. The general principle is that an owner has the disposing power over property, which is recognized by all civilized, and especially by all commercial, nations, to transfer his property for a good and valuable consideration; and the general disposition of all friendly governments is to give effect to such contracts when not opposed by some great consideration of public policy, or manifestly injurious to their own citizens. *A fortiori*, is this true of the several States of the American Union, which, though foreign to some purposes, are united for many others. Shaw, C. J., in Means v. Hapgood, 19 Pick. 105, 107.

[2] 2 Wall. Jr. 131.

[3] 18 Penn. St. 185.

[4] 55 How. Pr. 373. See also Moore v. Willett, 35 Barb. 668, and the well known case of Kelly v. Crapo, 45 N. Y. 86, which, on the point now under consideration, is fully in harmony with the text; see *post*, p. 439, note 8.

[5] 24 N. J. L. 166. See Varnum v. Camp, 1 Green, 329.

fer of personal property therefore good by the law of the owner's domicile, or by the law of the place where it is made, is valid wherever the property may be situated."[1]

The general principle is not universally true, but is subject to several exceptions. The necessary intercourse of mankind requires, to use the language of Chancellor Kent, that the acts of parties, valid where made, shall be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the State.[2]

§ 303. *Transfers under Bankrupt and Insolvent Laws.* —In considering the qualifications of and exceptions to this general rule of law, it may be primarily observed that there is a clear and well defined distinction, supported by the weight of American authority, between *involuntary* transfers of property, such as work by operation of law under foreign bankrupt assignments and insolvent laws, and a vol-

[1] The general rule is that the operation of a contract and the rights of the parties, so far as they depend on the construction and validity of the agreement, or on questions of sufficiency of performance, are governed by the laws of the place where the contract was made, if those laws are properly shown, rather than by the law of the place where it is put in suit. Boughton v. Bradley, 36 Ala. 689; Maguire v. Pingree, 30 Me. 508; Carnegie v. Morrison, 2 Metc. 381; Loan Co. v. Turner, 13 Conn. 249; Watson v. Brewster, 1 Penn. St. 381; Watson v. Orr, 3 Dev. L. (N. Ca.) 161; Martin v. Martin, 9 Miss. 176; Bulger v. Roche, 11 Pick. 36, 38; Blanchard v. Russell, 13 Mass. 14; Jones v. Jones, 18 Ala. 248; Young v. Harris, 14 B. Mon. (Ky.) 556; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191; Pitkin v. Thompson, 13 Pick. 64; Thompson v. Ketchum, 8 Johns. 189; Sherrill v. Hopkins, 1 Conn. 103; Pomeroy v. Ainsworth, 22 Barb. 118. In Livermore v. Jenckes (21 How. 126), where an assignment was made by a resident of Rhode Island, to assignees residing in the same State, exacting releases which would invalidate the assignment under the law of New York, and certain of the assigned property situated in the State of New York was taken into possession by the assignees, converted into money and the proceeds removed to Rhode Island; in an action subsequently brought by a judgment creditor in the Circuit Court for the Southern District of New York, to set aside the assignment as void, it was held that the assignment was to be tested by the laws of Rhode Island, and was valid, and that the judgment creditors had never acquired any lien upon the assigned property so as to subject it to their demands. In the arguments of counsel in this case will be found full and valuable references to and discussions of the cases. It seems that an assignment of a ship at sea, whether voluntary or involuntary, made in the State where she is registered and where her owners reside, has the same effect as it would have if the ship were actually in a port of that State, so that a creditor in another State cannot subsequently attach her on her arrival in a port of his own State. Crapo v. Kelly, 16 Wall. 610; rev'g 45 N. Y. 86; Moore v. Willett, 35 Barb. 663; Southern Bank v. Wood, 14 La. Ann. 554.

[2] 2 Kent's Com. 455.

untary conveyance. An assignment by law has no legal operation out of the State in which the act was passed, while a voluntary assignment, it being by the owner, is a personal right of the proprietor to dispose of his effects for honest purposes.[1] A general assignment under the insolvent laws of one State, can pass no title to real estate situated in another State;[2] nor will the title acquired under such foreign insolvent proceedings prevail against the rights of attaching creditors under the laws of the State where the property is actually situated.[3] The reason of this rule seems to be, that inasmuch as the conveyance is not voluntary, and is without consideration, it is void as against the grantor, except by force of the insolvent law of the State where it is made, and to give force to such law, would be to permit a foreign tribunal and a foreign law to regulate the trust, the action of the trustee, and the disposition of the trust property in another State.[4] "We can no more take notice of a trust created under a foreign government," said the Supreme Court of Massachusetts,[5] "than we can of a will not proved and recorded in this commonwealth."

And it is old doctrine "that a court of equity has much greater consideration for an assignment actually made by contract than for an assignment by mere operation of law." 1 P. Wms. 460.

§ 304. *Real Estate.*—The general rule of comity above stated does not extend to real estate. The title and dispo-

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[1] Walters v. Whitlock, 9 Fla. 86; Hutcheson v. Peshine, 16 N. J. Eq. 167; Lessees of McCullough's Heirs v. Roderick, 2 Ohio, 380; Rogers v. Allen, 3 Ohio, 488; Osborn v. Adams, 18 Pick. 247; Kelly v. Crapo, 45 N. Y. 86; Holmes v. Remsen, 20 Johns. 229; Abraham v. Plestoro, 3 Wend. 538; Hoyt v. Thompson, 5 N. Y. 320; Willets v. Waite, 25 N. Y. 577; Zipsey v. Thompson, 1 Gray, 243; Clarke v. Booth, 17 How. U. S. 377; Harrison v. Sterry, 5 Cranch, 302; Blake v. Williams, 6 Pick. 303; Lanfear v. Sumner, 17 Mass. 110; Dalton v. Currier, 40 N. H. 237; Saunders v. Williams, 5 N. H. 213; Ogden v. Saunders, 12 Wheat. 215; Miller v. Kemaghan, 56 Ga. 155; see Boston Iron Co. v. Boston Loco. Works, 51 Me. 585; Felch v. Bugbee, 48 Id. 9.

[2] Hutcheson v. Peshine, 16 N. J. Eq. 167; but see Green v. Gross, cited under § 304, *post*.

[3] Kelly v. Crapo, 45 N. Y. 86; rev'd on another point in 16 Wall. 610.

[4] Hutcheson v. Peshine, *supra*.

[5] Osborn v. Adams, 18 Pick. 248.

sition of real estate are exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass.[1] A deed or mortgage of real estate can only take effect in virtue of the law of the State where the land is situated.[2] This is a principle of general law, governing bankrupt as well as voluntary assignments.[3] In Maryland, it has been held that a deed made by a debtor in Delaware, to trustees for the benefit of his creditors, in conformity with the laws of that State, but not executed, acknowledged and recorded according to the laws of Maryland, will not operate to transfer real estate in the latter State.[4] It was held, however, that such a deed, if it embraced the rights and credits of the debtor, would transfer to the trustees for the benefit of his creditors, the balance of the purchase money of such real estate, where the debtor had, previously to its execution, contracted to sell the estate to a third person, received part of the purchase money, and given a bond to convey the legal title, upon payment of the whole.[5] And in Massachusetts, in a case where an insolvent debtor in Connecticut assigned all his property, including certain land in Massachusetts, in trust for the benefit of his creditors *pro rata*, under the provisions of a statute of that State, none of the creditors being parties to the assignment; and at the same time conveyed such land to the trustee by a deed which referred to the assign-

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[1] Wilde, J., in Osborn v. Adams, 18 Pick. 245, 247; citing McCormick v. Sullivant, 10 Wheat. 203; see Story's Confl. of Laws, c. 10.

[2] Dundas v. Bowler, 3 McLean, 399. It is provided by statute in Nebraska, that a deed of land in that State made in another State, must be executed according to the laws of the latter. Neb. Comp. Stat. c. 73, § 4; Green v. Gross, 13 Neb. 117. But this is no exception to the rule stated in the text; it is the Nebraska Statute which governs instead of the common law.

[3] Story's Confl. of Laws, § 423 a; 2 Kent's Com. [408] 498, note; McCullough's Heirs v. Roderick, 2 Ohio, 234; Rogers v. Allen, 3 Id. 488.

[4] Houston v. Nowland, 7 Gill & J. 480. And in a subsequent case in the same State, an assignment executed under the laws of the State of Kentucky, was held sufficient to pass the title to personal property in the State of Maryland, though the instrument was not recorded according to the laws of that State. Wilson v. Carson, 12 Md. 54, citing Houston v. Nowland, 7 Gill & J. 480; Black v. Zacherie, 3 How. 483, and referring to Ingram v. Geyer, 13 Mass. 146, *contra*.

[5] Houston v. Nowland, *supra*.

ment as to the purposes of the conveyance, and which was duly executed and recorded according to the law of Massachusetts, it was held that the statutory assignment in Connecticut was void in regard to land in Massachusetts; and that the second deed, being ancillary to the statutory assignment, was without consideration and void, as against creditors in Massachusetts who attached the land after such deed had been recorded.[1] So where land situated in Iowa, where preferences are not allowed, was conveyed by general assignment for the benefit of creditors, executed in the District of Columbia, where preferences in such assignments are not prohibited, it was held that the conveyance was repugnant to the laws of Iowa, and invalid, and could not operate even as an assignment in favor of all creditors in proportion to their respective claims.[2]

So a conveyance to assignees of land in Illinois by a voluntary assignment, executed in Rhode Island, was held to be invalid under the laws of Illinois, because the assignment of the land was not made for the purpose of dividing its proceeds among the creditors, and must, therefore, in some degree hinder and delay creditors in the collection of their debts.[3]

But in a case in New York, where a debtor residing in Maryland had assigned certain lands in New York to a trustee residing in that State, the Court of Chancery of New York lent its aid to enforce the execution of the trust, though at the suit of creditors residing in Maryland; there being no provision in the assignment repugnant to the laws of New York.[4] In a later case in New York, however, it was held that an assignment executed by debtors residing in this State, for the benefit of their creditors, although it relates to and embraces real and personal property in other

[1] Osborn v. Adams, 18 Pick. 245. In Connecticut, assignments are required to embrace all the property of the assignor, both real and personal, except such as is exempt from execution, and except real estate situated out of the State. Gen. Stat. (Rev. of 1875), p. 378, § 1.

[2] Loving v. Pairo, 10 Iowa, 282; see also McGoon v. Scales, 9 Wall. 23.

[3] Gardner v. Commercial Nat. Bank, 95 Ill. 298.

[4] Slatter v. Carroll, 2 Sandf. 573.

States, may, if our law deems it fraudulent, be declared void by the courts of this State.[1]

Though a deed of assignment be void in the State where it is made, if it is effectual to pass title to land in another State, it may be sustained by the courts of the latter State as against an attaching creditor from a third State.[2]

But the rule above stated does not apply to assignments of instruments conveying interests in real estate, such as mortgages; and such assignments are governed by the law of the place where they are made.[3]

It may be observed, before leaving this topic, that a voluntary assignment of real property is not inoperative and void in one State, where such property is situate, merely because it was made in another State, nor is it necessarily repugnant to the laws of the former State, because not conformable to them, for the reason that the laws of a State as to voluntary assignments having no extra territorial effect, may have no application whatever to foreign assignments. It was upon such considerations that a voluntary assignment made in Rhode Island, of real estate situate in Maine, was sustained in the latter State as against an attaching creditor from New York who had assented to it.[4]

§ 305. *The Lex Fori Governs the Remedy.*—As to all questions touching the remedy to be allowed on a contract, and the proper course of enforcing it, these are to be determined by the law of the place where suit is brought.[5]

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[1] D'Ivernois v. Leavitt, 23 Barb. 63, 64, 80.

[2] First Nat. Bank v. Hughes, 10 Mo. App. 7.

[3] Dundas v. Bowler, 3 McLean, 399.

[4] Chafee v. Fourth Nat. Bank, 71 Me. 514; see also Ockerman v. Cross, 54 N. Y. 29, where an assignment made in Canada, though not conformable to the laws of New York regulating voluntary assignments, was yet sustained as to personal property in New York, and against a New York creditor, because it was held that the New York Statute, which was relied upon, had no application whatever to foreign assignments.

[5] Ch. J. Gibson, in Speed v. May, 17 Penn. St. 95; Bennett, J., in Jones v. Taylor, 30 Vt. 48; Harrison v. Sterry, 5 Cranch, 289; and see the following cases, in several of which the questions arose on contracts other than assignments: Smith v. Atwood, 3 McLean, 545; Jones v. Jones, 18 Ala. 248; Dundas v. Bowler, 3 McLean, 396; Cox v. Adams, 2 Ga. 158; Brent v. Shouse, 15 La. Ann.

§ 306. *Where the Assignment is Repugnant to the Laws or Policy of the Forum.*—The municipal laws of a country or State have in strictness no force beyond its territorial limits, and where such laws and contracts made under them are admitted in other States, it is only on a principle of *comity*, which is always subject to the exception that no State will enforce a contract which is against its well settled policy or direct legislation. Voluntary assignments by debtors have frequently been subjected by the courts to the operation of this exception; and the mere circumstance of their being valid by the laws of the State in which they were made, has not been held sufficient to give them validity and effect in other States,[1] and on the other hand, their invalidity in the State in which they were made has not prevented them from being upheld in other States.[2]

Thus, in Massachusetts, in a case where a debtor residing in Pennsylvania, made an assignment of all his effects, in trust for such of his creditors as should within four months release all their demands against him, the surplus to be distributed *pro rata* among his other creditors, and the remainder, if any, to be paid over to the assignor, it was held to be void as against a creditor in Massachusetts, who, after such assignment, and after notice thereof to a debtor there, summoned such debtor as the trustee of the insolvent, such assignment not being valid according to the laws of Massachusetts.[3] And in a later case in the same State, where an assignment was executed in Rhode Island, and the assignor and assignees, by whom alone the deed was executed, were citizens of that State; and subsequent to the execution of the assignment, a

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110; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191; Dakin v. Pomeroy, 9 Gill (Md.), 1; Pitkin v. Thompson, 13 Pick. 64; Smith v. Spinola, 2 Johns. 198; Andrews v. Herriot, 4 Cow. 508, and note; Gulick v. Lodor, 13 N. J. L. 68; McKissick v. McKissick, 6 Humph. 75.

[1] Parker, C. J., in Blake v. Williams, 6 Pick. 286; Porter, J., in Olivier v. Townes, 2 Mart. N. S. (La.) 93.

[2] First Nat. Bank v. Hughes, 10 Mo. App. 7.

[3] Ingraham v. Geyer, 13 Mass. 146. See the remarks on this case by Grier, J., in Caskie v. Webster, 2 Wall. Jr. 131. The doctrine of this case was applied and followed in Fox v. Adams, 2 Greenl. 245.

citizen of Massachusetts who was indebted to the assignor, was summoned as his trustee in Massachusetts, at the suit of a creditor, a citizen of Massachusetts; and it appeared that such a debt was not wanted to satisfy the debts due to the assignees—it was held that the assignment was invalid as against such attachment, whatever might be the effect of such assignment by the law of Rhode Island.[1] And the rule in Massachusetts is that an assignment of property situated there, made in another State by a citizen thereof, for the benefit of his creditors, with provisions contrary to the policy of the laws of that State, is ineffectual as against an attachment there by a citizen.[2]

It would seem that where a debtor resident in one State makes a voluntary assignment of property in another, whether real or personal, in accordance with the laws of the latter State, and to an assignee there resident, the principle of inter-State comity ought to be liberally applied.[3]

§ 307. The courts have in some instances sustained and applied the law of the place where the personal property is situated in favor of attaching creditors, as against the title of the assignee acquired under an assignment executed and valid under the laws of the forum. Thus, in the New York case of Guillander v. Howell,[4] where an assignment giving preferences was made in New York to a resident of that State, and certain personal property embraced in the assignment, situated in the State of New Jersey, was subsequent to the assignment seized under attachment by a resident of the latter State, and an action was subsequently brought against the attaching creditor in

[1] Fall River Iron Works Company v. Croade, 15 Pick. 11.

[2] Boyd v. Rockford Mills, 7 Gray, 406; Pierce v. O'Brien, 129 Mass. 314; May v. Wannemacher, 111 Mass. 202; Taylor v. Columbian Ins. Co. 14 Allen, 353.

[3] Johnson v. Sharp, 31 Ohio St. 611. An assignment of property in New York by a citizen of that State, to a citizen of Massachusetts, then in New York, and a delivery of the goods, will be sustained against an attachment of the proceeds in the hands of the trustee. Goddard v. Winthrop, 8 Gray, 180; and see Martin v. Potter, 11 Gray, 37; Benedict v. Parmenter, 13 Id. 88.

[4] 6 Am. Law Reg. 522, and note; s. c. 35 N. Y. 657.

New York to recover for a conversion of the property, effect was given to the New Jersey law, under which an assignment with preferences is invalid, and the title of the attaching creditor was sustained.

The case of Green v. Van Buskirk,[1] which went through all the courts, is an important and instructive case. The facts were as follows: On the third day of November, 1857, Bates, who lived in Troy, New York, and owned certain iron safes in Chicago, Illinois, in order to secure an existing indebtedness to Van Buskirk and others, executed and delivered (in the State of New York) to them a chattel mortgage on the safes. Two days after this, Green, also a creditor of Bates, sued out of the proper court of Illinois a writ of attachment, caused it to be levied on these safes, got judgment in the attachment suit, and had the safes sold in satisfaction of his debt. At the time of the levy of this attachment the mortgage had not been recorded in Illinois, nor had the attaching creditor notice of its existence. The mortgagees subsequently sued Green in New York for taking and converting the safes. He defended the taking and conversion under the Illinois attachment proceedings, but judgment was nevertheless rendered against him in the lower courts, which was affirmed on appeal to the Court of Appeals, but reversed in the Supreme Court of the United States. The decisions in the State courts[2] were placed upon the ground that all the parties to the transaction being residents of the State of New York, the transfer was to be governed by the law of the owner's domicile, and that therefore Bates, at the time of the attachment, had no property in the safes upon which the writ could operate, and no title could be acquired under it.

The Supreme Court of the United States affirmed its jurisdiction[3] to entertain an appeal under the constitutional

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[1] 38 How. Pr. 52.

[2] Van Buskirk v. Warren, 34 Barb. 547; 13 Abb. Pr. 145; affirmed, 2 Keyes, 119; 4 Abb. Ct. App. Dec. 457; and see reporter's note, p. 461.

[3] Green v. Van Buskirk, 6 Wall. 307, Nelson and Swayne, JJ., dissenting.

provision that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,[1] and considering the questions upon their merits,[2] decided, that the law of the State of Illinois having been shown to be such that no title to the personal property passed under the mortgage, *quoad* creditors, by reason of want of delivery of the property,[3] and that the lien of the attachment proceedings was therefore valid, the full faith and credit required by the Constitution to be given to the judicial proceedings of other States, required the New York court to respect the title of the attachment creditor in Illinois. Speaking of the ground on which the decision in the State court was placed, Mr. Justice Davis makes use of the following observations: "The theory of the case is that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile, and this theory proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns, wherever it may happen to be located. But this fiction is by no means of universal application, and as Judge Story says, 'yields whenever it is necessary for the purposes of justice that the actual situs of the thing should be examined.'"[4] He adds: "We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all, there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed; and this principle of comity always yields when the laws and policy of the State where the

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[1] Const. sec. I, art. IV. [2] 38 How. Pr. 52; s. c. 7 Wall. 189.

[3] The policy of the law of Illinois will not permit the owner of personal property to sell it and still continue in possession. Davenport v. Thornton, 2 Ill.; Strawn v. Jones, 16 Ill. 117; Martin v. Dryden, 6 Ill. 187; Robertson v. Burnell, 10 Ill. 282.

[4] Green v. Van Buskirk, 38 How. Pr. 59; s. c. 7 Wall. 189.

property is located have prescribed a different rule of transfer from that of the State where the owner lives."[1]

§ 308. *Effect of an Actual Change of Possession.*— Where there has been an actual transfer of possession, the transfer will be upheld everywhere. The change of possession necessary to render the transaction complete and perfect against creditors has, however, in several cases been held to be that required by the law of the forum. Thus, in Vermont, where the assignment was made in New York, between residents of that State, covering a stock of goods in Vermont of which the assignees took actual possession, the title of the assignee was upheld against an attaching creditor;[2] but in a later case where the facts were similar, except that the change of possession, while such as might satisfy the law of New York, was not sufficient under the law of Vermont, the assignee's title to the property was not regarded as complete.[3]

In Ockerman v. Cross,[4] the assignment was valid under the laws of Canada, where it was executed, but was not "prepared, acknowledged, or recorded," in conformity with the provisions of the New York statute. The possession of the property in New York was actually transferred to the assignee. The Commissioners of Appeal (Lott, C. J.) were unanimously of the opinion that the details of the act were only intended to apply to assignments by a debtor or debtors residing in this State. The assignment in other respects was not repugnant to the laws of New York.

The last case was relied upon in a recent Maine case,[5] where a Rhode Island debtor assigned real estate in Maine by an absolute conveyance. A creditor who had acknowledged the assignee's title was held to be estopped from

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[1] Green v. Van Buskirk, 38 How. Pr. 60. [2] Hanford v. Paine, 32 Vt. 442.

[3] Rice v. Courtis, 32 Vt. 460; and see Mead v. Dayton, 28 Conn. 33; Koster v. Merritt, 32 Conn. 246.

[4] 54 N. Y. 29. This case is distinguished by the learned judge, in his opinion, from Guillander v. Howell, 35 N. Y. 657.

[5] Chafee v. Fourth Nat. Bank, 71 Me. 514.

attacking it on the ground that the formalities prescribed by the Maine statute had not been observed.

In Philson v. Barnes,[1] the property attached was claimed by an assignee under an assignment executed in Maryland, but not recorded in compliance with the laws of Pennsylvania, the title of the attaching creditor was sustained. And in a case in California, where an assignment had been made in Canton, China, by citizens of the United States, residing and doing business there, and was made complete by the delivery of the property to the assignees, it was held that though the assignment was not recognized by the law of California, it was sufficient to pass the property and entitle the assignees to be protected in their possession.[2]

§ 309. *Transfers of Choses in Action.*—With regard to choses in action, it has been said that they can have no situs other than that of the creditor. The prevailing rule in reference to this species of property appears to be that the validity of the transfer will in every instance be governed by the law of the place of contract.[3] In the case of Guillander v. Howell,[4] Mr Justice Peckham said: "A chose in action cannot surely be said to have any actual *situs* in the place where the debtor resides. As a general principle, it is payable at the residence of the creditor if not expressed otherwise, and a tender, to be good, must be made to the creditor. There would seem, therefore, to be no sound basis for the debtor's State to legislate exclusively as to the legality of a transfer of that debt made by a foreign creditor. In such case, as in all others where the property transferred does not actually lie within the jurisdiction of another government, a sale or a contract valid where made is valid everywhere."

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[1] 50 Penn. St. 230.

[2] Forbes v. Scannell, 13 Cal. 241. The *lex loci* of the assignment in this case, was held to be the particular law applicable to Americans residing in China, and not the general law prevailing in the Chinese Empire. Id. 139.

[3] See Mowry v. Crocker, 6 Wis. 326; Smith v. Chicago & N. W. R. R. Co. 28 Wis. 267; Noble v. Smith, 6 R. I. 446; Speed v. May, 17 Penn. St. 92.

[4] 35 N. Y. 657.

In the case of Caskie v. Webster,[1] in the Circuit Court of the United States for the Third Circuit, a citizen of Virginia had made an assignment, valid by the laws of that State, of all his property to another citizen of that State, for the benefit of such of his creditors as should assent to certain terms set forth in it, and which were not allowed by the laws of Pennsylvania. Several creditors, chiefly of Virginia, assented. One item of the property assigned was a debt due by a resident of Pennsylvania; and before the assignee could get the money from this debtor, a Pennsylvania creditor, who had refused his assent, attached it for a debt which was due to him. Assuming such an assignment to be void if it had been made in Pennsylvania—which, however, the court thought it was not—one question in the case was, whether this debt passed to the general assignee in Virginia, or was held by the attaching creditor in Pennsylvania. For the creditor, Ingraham v. Geyer was cited as deciding the exact point. But the court (Grier, J.) said: "A debt is a mere incorporeal right. It has no *situs*, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the law of his domicile, whether such assignment be called legal or equitable, will operate as a transfer of the debt, which should be regarded in all places." The learned judge went on to say: "In America, bankrupt or involuntary assignments by operation of law have not been considered as subject to this rule. But I know of no other established exception to the general rule, that a transfer of personal property valid by the law of the owner's domicile, is valid everywhere." After observing that such decisions as Ingraham v. Geyer are not binding as authority beyond the States in which they were made, the court conclude as follows: "Sitting here as a court of the United States, we do not think that the different States of this Union are to be regarded, as a general thing, in the relation of States foreign to each other. Espe-

[1] 2 Wall. Jr. 181.

cially ought they not to be so regarded in regard to questions relating to the commerce of the country, which is co-extensive with our whole land, and belongs not to the States, but to the Union."

It is held also in Ohio, that the principle of comity between States will enable the assignee of a chose in action, due in Ohio and assigned by a New York creditor, to collect the same in Ohio notwithstanding the *preferences* in voluntary assignments allowed by the laws of New York, on the ground that in such cases the law of the creditor's (assignor's) domicile is controlling.[1]

§ 310. *The Domicile of the Parties.*—Another general consideration governing the application of the rule giving effect to assignments, as between different States, is the residence or *domicile* of the parties affected by their operation. The important qualifications of the rule of comity, which has just been noticed, is limited in its terms to citizens of the State where the provisions of the assignment are sought to be enforced. As against citizens of *other* States, and especially as against citizens of the State where the assignment was made, the rule appears to hold without qualification, that an assignment valid by the laws of the State in which it is made, is valid everywhere.

The reason of this rule has been said to be "that the courts of a country will only violate that principle of comity which requires that sales valid where made shall be held valid everywhere, in favor of their own citizens, and in order to protect their rights, and that no such violation could be justified in favor of one who is seeking to go contrary to the laws of his own domicile.

In the case of Bentley v. Whittemore,[2] in the New Jersey Court of Errors, where an assignment containing preferences, made in the State of New York, between parties, none of

[1] Fuller v. Steiglitz, 27 Ohio St. 355; but see Paine v. Lester, 44 Conn. 196, which, in so far as its opinion goes, is a departure from the main current of authority, but the opinion seems to have been *obiter*.

[2] 19 N. J. Eq. 462; reversing s. c. 18 N. J. Eq. 366.

whom were residents of New Jersey, was attacked by a non-resident judgment creditor, on the ground that the assignment was invalid under the New Jersey statute prohibiting preferences, Mr. Chief Justice Beasley, after showing that the conveyance as to its ceremonious parts was in compliance with the laws of New Jersey, and that the assignment could therefore be avoided only on the ground that it was in discordance with the policy of the laws of that State, proceeded as follows: "I can imagine nothing that can be set up to invalidate it except the idea that the distribution of the assignment to which the conveyance is ancillary militates with the provisions of our statute upon that subject. Now, it is certainly not to be denied that if this incompatibility exists, the conveyance on the principle just admitted is completely inefficacious. But I have satisfied my own mind that there is no such inharmony, as is supposed, between the statute of this State and the regulations of this deed as they are now drawn, in question. It is true that this assignment has created preferences which are forbidden by our laws, and that therefore the deed accompanying it could not be set up against creditors resident in this State. But this does not touch the point of inquiry, which is, whether the laws of this government prohibit preferences between non-resident creditors under an assignment legal by the laws of the debtor's domicile? Have we any statute inconsistent with such a disposition of the debtor's property among foreign creditors? If we have, this conveyance, as I think, is certainly void, but if we have none such, then just as certainly it must be valid." Then citing the case of Moore v. Bonnell,[1] he proceeds to show that such is not the effect of the New Jersey statute, and he adds: "The true rule of law and public policy is this: that a voluntary assignment made abroad, inconsistent in substantial respects with our statute, should not be put into execution here, to the detriment of

[1] 31 N. J. L. 90.

our citizens, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect."

Thus, in Massachusetts, in a case where a citizen of Rhode Island, by a bipartite deed of assignment to which his creditors were not parties, conveyed all his property in trust to an assignee for their benefit, it was held that such assignment was valid in Massachusetts, as against a citizen of Rhode Island who had attached a portion of the property in Massachusetts; it being valid against attaching creditors, by the laws of Rhode Island.[1] The same rule was laid down in another case, decided shortly after, between parties standing in the same relation.[2] In another case in the same State, an assignment made in New York, and valid there, was held valid against a subsequent attachment, by a citizen of New York, of property in Massachusetts, although such assignment would have been invalid in Massachusetts, against dissenting creditors.[3] So, in the case of Bholen v. Cleveland,[4] in the Circuit Court of the United States for Massachusetts, where goods on consignment at Boston were, on the failure of the owners, assigned for the benefit of creditors; and, before notice of the assignment could be reasonably given to the consignees, another creditor of the debtors attached them by a trustee process in Boston; the debtor and the creditors being citizens of Pennsylvania—it was held that the assignment would overreach the trustee process. So, in Louisiana, it has been held that an assignment of personal property in trust for the payment of particular creditors, by preference, made in another State, under whose laws it was valid, between parties all of whom resided in that State, the property having been delivered to the assignees by the effect of the notice of the assignment previously served on garnishees, would protect the property, though subsequently found in Louisiana, from attachment in the latter State, at the suit of a creditor who resided in the State in which the

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[1] Whipple v. Thayer, 16 Pick. 25.
[2] Burloch v. Taylor, Id. 335.
[3] Daniels v. Willard, Id. 36.
[4] 5 Mason, 174.

assignment was made, and whose debt was contracted and payable there.[1] So, in Connecticut, where a debt due from an incorporated company in that State, to a citizen of Ohio, was assigned by him in Ohio, with other property, to another citizen of Ohio, in trust for his creditors, but the assignment was not lodged for record in the office of any court of probate in Connecticut (as required of assignments made in that State), it was held that such assignment, being valid by the laws of Ohio, was valid also in Connecticut, against the subsequent attachment of a creditor residing in Pennsylvania.[2] So, in New Hampshire, where a general assignment of property for the benefit of creditors was made by a citizen of Massachusetts, in conformity with the laws of that State, it was held to operate to transfer a debt due from a citizen of New Hampshire, as against creditors of the assignor, who were citizens of a foreign government, and who attempted to appropriate a debt in New Hampshire to the payment of their demand, by means of the trustee process.[3]

§ 311. *Assignments with Preferences.*—We may now consider the principles stated in their application to assignments giving preferences. In regard to voluntary assignments with *preferences*, it is laid down by Mr. Justice Story,[4] that they must, as to their validity and operation, be governed by the *lex loci contractus*. If they are valid there (that is at the place where the contract or assignment is made), full operation will ordinarily be given to them in every other country where the matter may come into litigation and discussion. But it is, as the same author remarks,[5] a very different question whether they shall be permitted to operate upon

[1] Richardson v. Leavitt, 1 La. Ann. 430.

[2] Atwood v. Protection Insurance Company, 14 Conn. 555.

[3] Sanderson v. Bradford, 10 N. H. 260. The same principle was applied in the case of Thurston v. Rosenfield, 42 Mo. 474. See Brown v. Knox, 6 Mo. 302. The general rule was applied in Chaffee v. Fourth Nat. Bank, 71 Me. 514; First Nat. Bank v. Hughes, 10 Mo. App. 7; Pierce v. Crompton, R. I. Index O, 18. But in Paine v. Lester, 44 Conn. 196, 204, the court would abolish all distinction between citizens of Connecticut and citizens of sister States.

[4] Story's Confl. of Laws [ed. 1852], § 423 f.

[5] Id. ibid. citing Andrews v. His Creditors, 11 La. 476, 477.

property locally situated in another country, whether movable or immovable, by whose laws such a conveyance would be treated as a fraud upon the unpreferred creditors. There appears, however, to be no uniform settled rule on this point in the United States. In a case in Louisiana, an assignment made in Pennsylvania, and giving preferences, though not in conformity, in this respect with the laws of Louisiana, was sustained by the court, who, after a protracted and elaborate discussion, laid down the rule that an assignment of property to trustees for the benefit of the creditors of the assignor, legal and valid by the laws of the State in which it was made, and accompanied by delivery,[1] will be respected in that State; and that such contracts must be governed by the law of the place where they were executed.[2] So, in the case of Dundas v. Bowler,[3] in the Circuit Court of the United States for Ohio, where an assignment made in Pennsylvania, and giving preferences as then allowed in that State, included a mortgage of land in Ohio, where, by statute, assignments with preferences were declared to inure to the benefit of all the creditors; it was held to operate according to its terms, unaffected by the Ohio statute. But in Delaware, it has been decided that an assignment with preferences, made in another State, where it was valid, would not be sustained against a subsequent attachment by a citizen of Delaware, of effects of the insolvent found in that State.[4] And in a case in Massachusetts, an assignment of property in Massachusetts made in New York by insolvent citizens of that State, and giving preferences to certain creditors also citizens of New York, was held to be ineffectual as against a subsequent attachment made in Massachusetts by a citizen

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[1] It will be seen that *delivery* is here stipulated for, as an essential requisite to the operation of the assignment. This was following the principle of Oliver v. Townes (2 Mart. N. S. [La.] 93), and the court supposed the case of Ingraham v. Geyer (13 Mass. 146) to turn on the same point. See also Fuller v. Steiglitz, 27 Ohio St. 355.

[2] United States v. Bank of the United States, 8 Rob. (La.) 262; cited and relied on in Forbes v. Scannell, 13 Cal. 242.

[3] 3 McLean, 397.

[4] Maberry v. Shisler, 1 Harr. (Del.) 349.

of that State.[1] In deciding this case it was remarked by the court (Thomas, J.), that "the law of New York, *proprio vigore*, cannot obtain here. It derives its effect only from the rule of comity, and that rule refuses to give force to laws of other States which directly conflict with the policy of our own." And again, "No comity can require us to give effect to an assignment made in another State, which is not only against our well settled policy but against our direct legislation, and the effect of which would be to give a preference to citizens of other States over those of our own."[2]

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[1] Zipcey v. Thompson, 1 Gray, 243. See also Guillander v. Howell, 35 N. Y. 657, where a New York assignment with preferences was held inoperative in New Jersey, as against a subsequent attaching creditor resident there.

[2] Id. 245. In the Georgia cases of Stricker v. Tinkham (35 Ga. 177), and Mason v. Stricker (37 Ga. 262), where the assignment executed in Tennessee, covered property in Georgia, and contained preferences which were allowed under the laws of Tennessee but not under the laws of Georgia, as they then stood, the courts of Georgia refused to enforce the contract. In the Missouri case of Kitchen v. Reinsky (42 Mo. 427), which was an assignment executed in New York between citizens of that State, in an action between the assignee and an attaching creditor, Fagg, J., observed: "It is admitted that as to the parties to the assignment, the rule would hold without qualification, that if it is valid by the laws of the State of New York, it is to be regarded here." But the court held the assignment invalid under the New York law. See Bryan v. Brisbin, 26 Mo. 423. But in the case of Thurston v. Rosenfield (42 Mo. 474), where the attaching creditor was a resident of the State where the assignment was made, the court refused to disturb the assignment to the prejudice of the interest of creditors residing in Missouri.

CHAPTER XXIV.

CONSTRUCTION OF ASSIGNMENTS.

After an assignment has gone into operation, courts are frequently called upon to *construe* it, either as a whole, or in one or more of its clauses or provisions; it being well established that it is the province of the court to pronounce upon the legal effect of a provision in an assignment, and that the submission of such a question to the jury is error.[1] Thus, they may be called upon to determine the general character of the instrument, as whether it is to be regarded as an assignment or a mortgage;[2] or to pronounce upon its general effect, as tending to hinder, delay or defraud creditors; or upon the tendency of some particular trust or provision to the same result; or, finally, to interpret some clause, or words, or even a single word, where the object is not to impeach the validity of the instrument, but to aid its operation according to its proper meaning. The present chapter will be devoted to the subject of construction, so far as it falls under the last of these heads.[3]

The general rule applied by the courts in the construction of assignments is that well-known one expressed by the maxim, *ut res magis valeat quam pereat*, the instrument in question shall rather be made available than suffered to fail.[4] Such a construction will be given to the assignment

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[1] Sheldon v. Dodge, 4 Den. 217; Cunningham v. Freeborn, 3 Paige, 557; Goodrich v. Downs, 6 Hill, 438.

[2] See *ante*, p. 13.

[3] The construction of assignments, so far as it tends to invalidate them, has been already incidentally noticed in the course of this work, and will be further considered under the head of "Fraudulent and void assignments," *post*, Chap. XXV.

[4] Cowen, J., in Darling v. Rogers, 22 Wend. 483, 488. The learned judge in this case referred to that provision of the New York Revised Statutes which de-

as will carry into effect the intention of the parties.[1] The deed is to be construed by the *res gestæ;* and thus courts are permitted to look to the circumstances and motives which led to its execution, and the objects to be accomplished.[2] Where it is ambiguous in its terms, and admits of two constructions, that interpretation should be given to it which will render it legal and operative, rather than that which will render it illegal and void.[3] Under the maxim above cited, the courts have upheld assignments void in part (as containing a trust prohibited by statute), if otherwise valid; the maxim being held to apply as well where what is void is declared so by statute, as where it is so at common law, unless the prohibitory enactment declares that *the deed* by which the thing is done shall be void.[4]

The portions or clauses of an assignment which must frequently become the subject of judicial construction or interpretation are those containing a description of the property assigned, and a designation of the debts to be paid; those containing stipulations for a release of the debtor; and those conferring particular powers on the assignee.

§ 312. *Description of Property—what Passes by the Assignment.*—Under this head,[5] the following cases of construction have been decided. A. & B., partners in trade, conveyed to C. "all their, the said A. & B.'s, *real* and personal estate, whatsoever and wheresoever, and all their estate, right, title and interest in the same," &c., in trust to

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clares that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law. 1 Rev. Stat. [748] 740 (2d ed.), § 2; 3 R. S. (7th ed.) p. 2205.

[1] Coverdale v. Wilder, 17 Pick. 181.

[2] Bellamy v. Bellamy's Adm'r, 6 Fla. 62.

[3] Sutherland, J., in Grover v. Wakeman, 11 Wend. 187, 192. In Brigham v. Tillinghast (15 Barb. 618), it was said of assignments giving preferences, that so long as they are tolerated, they should receive the same reasonable and fair construction which every agreement *inter partes* receives from courts of justice. Allen, J., Id. 620.

[4] Darling v. Rogers, 22 Wend. 483.

[5] See also Chap. VI.

sell and dispose of the same, and to collect the debts due to them, "*for the firm aforesaid*," and out of the proceeds of the sale, and the money collected, to pay the debts of the *partnership*. The deeds recited the inability of the *firm* to pay their debts, but no mention was made of *separate* debts; throughout the deed the names of the partners were mentioned *together*; and if a surplus remained after satisfying their creditors, it was directed to be "returned, reconveyed and assigned to the said A. & B., their executors, administrators, and assigns." At the date of the deed, the *partnership* did not hold any real property; but A. was the owner of real estate, in his separate capacity. It was held that the separate real estate of A. passed by the assignment.[1]

In a case[2] in Connecticut an assignment was made by two partners of "all our real and personal estate, and claims and choses in action of every kind whatsoever and wheresoever situated, except property by law exempt from execution." This was held to carry individual as well as partnership property. On the other hand, separate assignments by the several members of a copartnership, of all their property to the same assignee, carry their firm property.[3]

Where an assignment for the benefit of creditors recited that the assignor was willing to assign "all his goods, chattels, and effects," and then proceeded to grant, transfer, &c., "the following named goods and chattels, viz.:" enumerating certain articles of household furniture, agricultural implements, cattle, "bonds and notes," "and other articles of furniture, goods and chattels, and effects, which I now own or possess, excepting only thereout so much as is allowed by the insolvent laws to insolvent debtors;" *habendum*, in trust, to sell the same at public or private sale, and to apply

[1] Wharton v. Fisher, 2 S. & R. 178.

[2] Von Wettberg v. Carson, 44 Conn. 287; Coggill v. Botsford, 29 Id. 445. Similarly in a case in Kansas, an assignment executed by partners was held to be general, and to include separate as well as firm property, though where the names of the assignors occur in the deed they are immediately followed by "copartners" or "partners," these words being regarded as mere *descriptio personæ*. Williams v. Hadley, 21 Kans. 350; see also Malcolm v. Hodges, 8 Md. 418.

[3] Boughton v. Crosby, 47 Conn. 577; Stiness v. Pierce, R. I. Index P, 65.

the money arising therefrom to the payment of certain debts, it was held that the terms were broad enough to pass *choses in action* to the trustee, and therefore that such trustee had the right to control an execution which had issued on a judgment obtained for a debt due to the assignor.[1]

Real and personal estate was devised to A. in trust, to pay the rents, profits and income to B. during his life, and after the death of B. to convey the same estate to C., his heirs, executors, administrators, and assigns, for his own sole and proper use, without the control of any person whomsoever, "and without being subject or liable to his debts, contracts or engagements." During the lifetime of B., C. made an assignment of all his estate and effects to assignees for the benefit of creditors. It was held that his interest under the will passed to the assignees.[2]

A voluntary assignment was made to trustees, of "the lands and tenements, estate real and personal and mixed, of what nature and kind soever, and wheresoever the same may be, merchandise, vessels, goods, moneys and effects, and debts due, owing or coming due, or belonging" to the assignor. It was held that the assignment would not pass a claim against the United States for wrongfully preventing the assignor, owner of lands in Florida, from cutting and removing the timber therefrom.[3]

But it has also been held that a clause in an assignment conveying "all that they (the assignors) have in satisfaction of their debts and all debts due" to them, included a demand pending in court against certain railroad companies for damages to a foundry and to an incorporeal hereditament appurtenant thereto.[4]

In a case in Michigan[5] the assignment was of "all his (the debtor's) estate and effects, real and personal, of every

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[1] Dowdel v. Hamm, 2 Watts, 61.
[2] Stuckert v. Harvey, 1 Miles, 247.
[3] Sibbald's Estate, 18 Penn. St. 249.
[4] Mayo v. Snead, 78 Ky. (1 Rodm.) 634.
[5] Burrows v. Keays, 37 Mich. 430. (This was an action of trover by the assignee under a foreign insolvent law against the assignor.)

nature and kind whatsoever." This was held a sufficient description to pass title to the assignee as against the assignor and wrong-doers.

The words "all the goods, chattels and effects, and property of every kind personal and mixed," do not include real estate.[1]

In a case in Maine, under the statute of 1836, concerning assignments, an assignment was made in general terms, sufficiently broad to embrace all the property of the debtors, of whatever name or nature (except such as was exempt from attachment), "as will appear by the schedule under oath, and hereunto annexed, which is intended to give only a general description of the property assigned, subject to such further enlargement or diminution in value, as a particular and minute survey of the property shall justify." Such schedule was annexed. The assignors made oath that the assignment embraced all their property, except such as the law exempted from attachment, as appeared by the certificate thereof by a magistrate. It was held that the assignment passed all the property of the assignors which was required by the statute.[2]

In a case in New York, where a devisee of real estate, to whom also personal estate had been bequeathed, charged with the payment of debts, assigned "all his share and claim in and to the personal estate of the testator, and in and to all moneys which then were, or might thereafter come into the hands of the executors, arising from any property or estate of the testator;" and the executors had, previously to such assignment, sold a portion of the real estate devised, under a surrogate's order, for the payment of debts, by reason of a deficiency of personal estate; and, subsequently to the assignment, other assets were discovered, and received by the executors, it was held that the equitable right of such devisee to be indemnified for the sale of his real estate, out of assets and moneys subsequently discovered and re-

[1] Rhoads v. Blatt, 84 Penn. St. 31; see Price v. Haynes, 37 Mich. 487; Seifreid v. People's Bank, 2 Tenn. Ch. (Cooper), 17.

[2] Pike v. Bacon, 21 Me. 280.

ceived by the executors, passed to the assignee, although not specially mentioned in the assignment, and although it did not appear that the assignor knew of the fund in question.[1]

In a case in Florida, where an assignment, after specifying certain slaves by name, and also enumerating other personal property of the debtor, contained a general clause conveying "all his personal effects of every name, nature, and description," &c., it was held to embrace things *ejusdem generis* with those which had been mentioned before, and to convey, for the purposes of the trust, any other slaves which then belonged to the grantor, and not before specified by name, and especially where the *res gesta* favors that construction; but not to pass real estate or equity of redemption in land.[2] In the same case it was held, that where an assignment conveyed "all the future cotton crops made on said plantation," an estate was conveyed commensurate with the trust; and although it did not pass the equity of redemption in the land, yet it was a fiduciary license, lease, or conveyance thereof, and of all that was necessary to the management of the plantation and appropriation of the crops, for the objects and purposes of the trust.[3]

It is a recognized rule of construction, that where a general clause in a conveyance is followed by special words in accord therewith, the grant will be limited to the special matter. Therefore by a conveyance of "all of our property of every description, the same being embraced in a schedule herewith annexed," only the property in the schedule will pass.[4]

But an assignment which conveys all the real, personal and mixed property of the debtor, and purports to give a schedule thereof followed by the clause "and any and all other property not exempt from execution, which by over-

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[1] Couch v. Delaplaine, 2 N. Y. 397.

[2] Bellamy v. Bellamy's Adm'r, 6 Fla. 62.

[3] Id. ibid.

[4] Belding v. Frankland, 8 Lea (Tenn.), 67; see *ante*. p. 184.

sight may have been omitted in the foregoing list," was held, in Kentucky, to pass to the assignee the income of property held in trust for the benefit of the debtor, although it is not mentioned in the schedule.[1]

In England, under an assignment to creditors, by a debtor, of all his stock in trade, book and other debts, goods, securities, chattels and effects whatsoever, except the wearing apparel of himself and his family, it was held that a contingent interest in the residuary estate of a testator (to which the debtor was entitled in the event of his sister dying without a child), passed.[2]

§ 313. *Designation of Debts to be Paid.*—Where an assignment was made to three persons, the debts due to the assignees, or either of them, to be first paid; it was held, in Maine, that a debt due to a firm of which one of the assignees was a member, was within the provision for a preference.[3] But an assignment to two persons to secure their liabilities for the assignor, does not secure their several liabilities.[4] In New York, where one of the trusts in an assignment was to pay to L., one of the assignees, such sums of money as should from time to time be due to him from the assignors, and all such sums of money as he then was, or should thereafter become, liable to pay, or should pay on account of the assignors, as indorser or otherwise, it was held by the Court of Chancery, that the moneys here referred to, which L. might thereafter pay, or become liable to pay, on account of the assignors, were only meant to include such as he might pay or become liable to pay by reason of indorsements, or other contingent responsibilities, which he had already made or incurred on their account.[5]

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[1] Knefler v. Shreve, 78 Ky. (1 Rodm.) 297; and in Union Nat. Bank v. Bank of Commerce (94 Ill. 271), a deed was held to include, properly construed, all the individual creditors, though the names of some of them were not in a schedule subsequently filed.

[2] Ivison v. Gaissiot, 27 Eng. Law & Eq. 488.

[3] Wilson v. Hanson, 12 Me. 58.

[4] Yelverton v. Shelden, 2 Sandf. Ch. 481.

[5] Barnum v. Hempstead, 7 Paige, 568, 570, 571.

In Pennsylvania, where an assignment was made of all the assignor's estate and effects, in trust, among other things, "to pay and discharge all the debts that *were* by him (the assignor) then *due*, or were *owing* or growing due, to such of his creditors as should (within a certain time) execute a release," &c., it was held that a bank by which a note drawn by A. for the accommodation of the assignor, was discounted, was entitled to the benefit of this provision in the assignment.[1] In another case, in the same State, under an assignment made for the payment (among others) of "all accommodation *notes* subscribed or indorsed for the assignors, so as to exonerate the makers or indorsers of the said *notes* from their liability therefor," it was held, 1st, that a *bill* drawn on the assignors, for their accommodation, in favor of and indorsed by the drawer, and accepted and negotiated by the assignors, was within the preference given by this clause; 2d, that the holders of such accommodation notes were entitled to be paid only what remained, after deducting the balance due to the assignors from the subscribers or indorsers on other accounts.[2] And in a recent case in the same State, where the Bank of the United States had made an assignment of assets exceeding twelve millions of dollars, to pay depositors and holders of notes of the former and of the bank then existing, "being notes of the ordinary kind, payable on demand and commonly used in circulation;" and also "to sundry persons, holders of notes of the said bank commonly called *post-notes*," with certain exceptions; and the assignment further provided that the bank had "resolved and agreed to provide an adequate security for the payment of the said deposits, and of the said notes, and of the said post-notes," except, &c., "and of the interest to accrue upon them," &c., it was held that the *post-notes* meant in the said assignment, and designed to be secured by it, were such notes payable at a future day as were designed as

[1] Bank of Pennsylvania v. McCalmont, 4 Rawle, 307.

[2] Da Costa v. Guieu, 7 S. & R. 462.

a part of *the circulating medium*, and that the assignment did not include notes or obligations of the bank under seal, payable at a future day in London, each being for one thousand pounds sterling with interest, which were issued for a loan of money to the bank, and which were not designed to be a part of *the circulation of the bank*.[1] In another case in the same State, where a deed had been made in trust to pay debts, and afterwards to pay certain other sums to divers donees, the clauses directing such payments being numbered successively, but no other indication appearing that such donees were to be paid in their order, it was held that, in case of deficiency, they were to be paid *pro rata*.[2] And in the same case it was further held that a trust to pay "all debts due by A. B." did not authorize the trustee to pay promissory notes, subsequently given by A. B. without consideration and as voluntary gifts.[3]

In Alabama, it has been held that a deed of trust providing that the trustee should first pay all debts described in the deed, for which the complainant was liable, or liable in any other manner, and afterwards providing for creditors generally, did not authorize the trustee to pay the complainant as a preferred creditor, any other debts than those paid by him as surety.[4] But in a case in Tennessee, where a deed of trust purported to convey property "as a security for all the debts for which the *cestui que trust*, therein named, had become liable," it was held that it was not to be construed as merely for the indemnity of the said *cestui que trust* alone, but that every other creditor having an interest under the same, had a right to compel the trustee to appropriate the proceeds of the property to the satisfaction of his debt, even in the event of the discharge of the *cestui que trust* named from all liability; and that, in such case, it was the duty of the trustee to protect the property and hold it subject to the trusts declared.[5]

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[1] Hogg's Appeal, 22 Penn. St. 479.
[2] Greenfield's Estate, 24 Penn. St. 232.
[3] Id. ibid.
[4] Gilchrist v. Gilmer, 9 Ala. 985.
[5] Jones v. Hamlet, 2 Sneed, 256.

In a case in Massachusetts, where, in a schedule of preferred demands annexed to an assignment, a debt was designated as "S. & T.'s drafts (accepted by the debtors), for which they hold a mortgage of B. W." &c., it was held that the trust was not personal to S. & T., but that the holders of the draft to whom it had been indorsed before the making of the indenture, were entitled to the benefit of the trust.[1] So, in New York, where an assignment contained a clause directing the assignee to pay, in the first class of debts, every *sum of money owing by the assignors*, whether then due or to become due, and payable thereafter, for which D. and F. were indorsers or sureties, &c., it was held that under this provision of the assignment, persons who had accepted and paid drafts drawn upon them by the assignors, on the credit of property consigned to the drawees, to be sold on commission, and which drafts had been indorsed by D. and F. were not entitled to be paid the amount of such drafts, out of the assigned funds, as preferred creditors of the assignors.[2] It was also held that the acceptors of the drafts were to be considered the principal debtors, and the drawers only the sureties; and that, consequently, the assignors were not *debtors*, and did not *owe* the sums of money secured by the drafts, within the meaning of the provision in the assignment.[3]

So, where the assignor, as a part of the class of his preferred debts under the assignment, directed his assignees to pay to H. J., his agent in New York, and to several other persons named therein, the amount of all such notes, checks, or drafts as they, or any of them, had made, indorsed, or accepted for his accommodation, it was held that the owners of the several notes and drafts which had been indorsed or accepted for the accommodation of the assignor by H. J. previous to the execution of the assignment, and which notes

[1] Ward v. Lewis, 4 Pick. 518; see Heilner v. Imbrie, 6 Serg. & R. 401. For a case where the assent of creditors was construed not to operate as payment of their claims, see Dickinson v. Metacomet Nat. Bank, 130 Mass. 132.

[2] Doolittle v. Southworth, 3 Barb. S. C. 79. [3] Id. ibid.

and drafts he was legally liable to pay to the holders thereof, by reason of such indorsements or acceptances, were entitled to be placed in the class of preferred creditors, in the distribution of the assigned fund; as H. J. would himself have been placed there, if he had actually paid and taken up such notes and drafts with his own funds.[1]

The following important cases of construction have occurred in Pennsylvania. In Heilner v. Imbrie,[2] the facts were these: A. & B. by deed conveyed all their estate in trust to pay "1st, the following named persons [naming them] the following sums, &c., for money lent, &c. "2d, to pay and satisfy the *following named persons* the following sums of money, being for *notes lent and indorsements*, to wit: C. & Co., 2,053 dollars; to D. & E., 6,490 dollars." "Provided that no one of the *debts* before mentioned, shall have any preference, but the same shall be paid ratably, according to their respective amounts," &c. And "provided that no one of the creditors preferred and named as aforesaid, on whose paper the said assignors should be and remain indorsers, should receive their proportions until they should have taken up the said notes, or otherwise freed them from their responsibility as indorsers." Prior to the assignment, A. & B. had drawn four notes, amounting together to 2,053 dollars, which became due after the assignment, and were indorsed by C. & Co., for the accommodation of A. & B., and were given to D. & E. for goods sold by the latter to A. & B. On the day of the date of the assignment, D. & E. executed a release to the assignors; and at the execution of the assignment, the assignors were not indebted to C. & Co., who, on the contrary, were indebted to the assignors. It was held that the preference was not given to C. & Co. personally, but to the four notes indorsed by them; and that D. & E., in whose hands they were, might recover the amount due on them, in an action brought in the name of C. & Co. for their use.

In Hacker v. Perkins,[3] the facts were these. An assign-

[1] Pratt v. Adams, 7 Paige, 615.
[2] 6 Serg. & R. 401.
[3] 5 Whart. 95.

ment was made by P. S. & Co. of all their estate and effects, in trust, for the payment of creditors by classes, the provision for the second class being in these words: "2d, to pay and satisfy all and every sum and sums of money borrowed by the said firm from individuals or firms, and for which either the bond or promissory note of P. S. & Co. has been given, and fully to indemnify and save harmless all and every individual and firm, of and from all loss for or by reason of any promissory note, draft or bill of exchange, drawn, indorsed or accepted, or signed by him or them, for the accommodation of the said parties of the first part." The plaintiffs had, about a year before the assignment, sold goods to P. S. & Co. for which the notes of the latter were taken. When these notes became due, P. S. & Co. were in difficulties, and the plaintiffs agreed to renew the notes upon the payment of part. The original notes and many of those given in renewal, were deposited by the plaintiffs in the bank, and some of both kinds were discounted at the bank for the plaintiffs, and some had been transmitted by the plaintiffs to their correspondents, for the price of whose goods, sold by the plaintiffs to P. S. & Co., they had been taken. The method pursued by the parties was this: When a note became due, P. S. & Co. took a new note for the amount they wished renewed, adding interest, to the counting-house of the plaintiff, and received from them their check or money for the amount of the new note; P. S. & Co. then drew the amount of the plaintiff's check out of bank, and applied that money towards the taking up of the old notes, they (P. S. & Co.) paying the difference between the notes and the interest, with their own funds. The notes were thus reduced and renewed from time to time. It was held that the plaintiffs were not entitled, in respect to these notes, to come in as creditors of the second class.

In Coverdale v. Wilder[1] (a Massachusetts case), the facts were these. An indenture by which a debtor made a gen-

[1] 17 Pick. 178.

eral assignment of his property in trust for the benefit of his creditors provided that the assignees should first satisfy and pay unto any deputy sheriff all claims or incumbrances he might have upon any of the property assigned, by virtue of any attachment thereof, upon any legal precept. A deputy sheriff who had made such an attachment, became a party to the indenture, but the action was not discontinued. The assignor died, and a commission of insolvency was issued upon his estate; and so the attachment was dissolved. The attaching creditor summoned in the administrator, and recovered judgment. Upon a bill in equity, brought by the attaching creditor and the attaching officer against the assignees, it was held, that the execution of the assignment by the officer inured to the benefit of the attaching creditor; that the intent of the assignment was, that the debt due to such creditor should be paid, and not merely that his lien should be removed; that his continuing his action in court was not a waiver of his right under the assignment; and that he was entitled to recover the amount of his original claim, with so much of the costs as had accrued before the execution of the assignment.

In Colgin v. Redman[1] (an Alabama case), a deed of trust contained the following provisions, viz.: "They [the trustees] shall pay and satisfy the following debts of the party of the first part, in *the following order*, to wit: first class," &c. [naming them]. "The above demands compose the first class of preferred creditors, being principally indorsers, securities, and those who advanced money to the said party of the first part; and all are to be first satisfied and discharged in full. The second class comprises the following claims," &c. [naming them], "which shall be paid ratably and proportionably after the entire discharge of the debts in the first class enumerated." It was held that the word "order" referred to the division of the debts into *classes*, and not to the *relative position* of the debts specified in the

[1] 20 Ala. 651.

first class; and that the funds, being insufficient to satisfy all the debts of the first class, must be divided ratably among those who assented to the deed within the time therein specified.

In the case of Murrill v. Neill,[1] in the Supreme Court of the United States, the facts were as follow: A merchant who owed debts upon his own private account, and was also a partner in the two commercial houses which owed debts upon partnership account, executed a deed of trust containing the following provisions, viz.: It recited a relinquishment of dower by his wife in property previously sold, and in the property then conveyed, and also a debt due to the daughter of the grantor, which was still unpaid; and then proceeded to declare that he was indebted to divers other persons, residing in different parts of the United States, the names of whom he was then unable to specify particularly; and that the trustee should remit from time to time to A. N. of the first moneys arising from sales, until he should have remitted the sum of fifteen thousand dollars, to be paid by the said N. to the creditors of the grantor, whose demands should then have been ascertained; and if such demands should exceed the sum of fifteen thousand dollars, then to be divided among such creditors, *pari passu;* and out of further remittances there was to be paid the sum of twelve thousand dollars to his wife as a compensation for her relinquishment of dower, and next, the debt, due to his daughter; and after that, the moneys arising from further sales were to be applied to the payment of all the creditors of the grantor whose demands should then have been ascertained. In case of a surplus, it was to revert to the grantor. The construction of this deed was held to be, that the grantor intended to provide for his private creditors only, out of this fund, leaving the partnership creditors to be paid out of the partnership funds.

In the New York case of The Bank of Silver Creek v. Talcott,[2] an assignment of individual and partnership

[1] 8 How. 414.

[2] 22 Barb. 550.

property, made by persons indebted both individually and as copartners, after appropriating the individual property, and providing that the proceeds of the partnership property should be first applied to the payment of a certain class of creditors, proceeded to direct the assignees as follows, viz.: That by and with the residue and remainder of the net proceeds and avails of the assigned property, if any there should be, the assignees should pay and discharge all copartnership debts and demands of the assignors, for which the assignees and A. T. were severally and jointly liable, as drawer, indorser, guarantor or otherwise; and in case A. T. H. (one of the assignees), should be compelled to pay the whole or any part of two drafts for $3,000 each, drawn by E. B. H. on B. H. B., and indorsed by the said A. T. H. at the request and in part for the accommodation of the assignors, then that the assignees should pay to the said A. T. H. the amount that he might be compelled to pay on the said drafts. It was held by the Supreme Court, that this provision did not vitiate the assignment, as showing an intent to hinder, delay, or defraud creditors, or as directing the payment of debts not owing by the assignors, and not contracted on their account. It was held further, that, until there was some evidence to show the contrary, it must be presumed that the assignors were bound to indemnify A. T. H. and save him harmless from his indorsement; that, in effect, they alleged this in the assignment, and the *onus* was upon the party charging the fraud, to disprove the statement. And it was further held that if the direction to the assignees to pay such amount as A. T. H. should be *compelled* to pay was to be construed as contemplating a defense by A. T. H. and consequent delay, and that the assignees must necessarily wait the termination of proceedings against A. T. H., or until the statute of limitations should attach, the delay was not of that character condemned by the statute.

§ 314. *Stipulation for Release of Assignor.*—Where an assignment was made in favor of such creditors as should

"within sixty days from the date of the instrument," execute a release, it was held that the day of the date was excluded.[1] But where the time given for executing a release expired on Sunday, it was held that that day was included, so that a creditor executing a release on the succeeding Monday was out of time.[2]

Where the maker of a note, which was indorsed, made a general assignment of his property in trust to pay his debts, which was executed by the holder and by the indorser of the note, and which contained a general release of all claims against the assignor, "provided that nothing contained in the assignment should be construed to impair or affect any lien or pledge theretofore created or obtained as security for a debt or claim due from the assignor," it was held in Massachusetts, that the security by the indorsement was a "lien or pledge," within the meaning of the proviso, and that the release of the maker did not discharge the indorser, he having agreed to the release by becoming a party to the assignment.[3]

Where an assignment was made in trust to pay creditors of the first class their debts; creditors of the second class their debts, the payment to be ratably made, in proportion to their respective demands; and creditors of the third class on the same terms with those of the second; provided that no creditor should be entitled to receive a dividend unless he executed a release in thirty days, it was held, in Pennsylvania, that a creditor of the first class was bound to execute a release before he could receive his debt.[4] In the same State, it has been held that a general release, under an assignment, of all the releasor's demands, must be construed [to include] a release of a mortgage debt, especially where the only debts due from the assignor to the

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[1] Pearpoint v. Graham, 4 Wash. C. C. 232. [2] Id. ibid.

[3] Gloucester Bank v. Worcester, 10 Pick. 528; Ludwig v. Iglehart, 43 Md. 39; Bruen v. Marquand, 17 Johns. 58; Dickinson v. Metacomet Nat. Bank, 130 Mass. 132.

[4] Wilson v. Kneppley, 10 Serg. & R. 439.

releasor are a mortgage debt, and are preferred by the assignment; and so, although the assignor afterwards takes the benefit of an insolvent law, and returns the mortgage as due.[1]

The following cases of construction in Pennsylvania are referable to this head. In Cheever v. Imlay,[2] the facts were these: An assignment was made by a debtor to trustees, 1, for the payment of certain specified debts, if there should be sufficient to pay the whole of them, but if not, then in just and equal proportions; 2, for the payment of all the other just debts of the assignor (with certain exceptions), "in full, if the moneys be sufficient, if not, then in just and equal proportions;" and after paying the said debts of the second class; then, 3, to pay certain other debts, and if any surplus should remain, then to pay the same to the assignor; provided that before the payment of any of the said debts, in any of the said classes, the respective creditors should release within a certain period. It was held that a creditor of the second class who did not release within the required period was not entitled to a dividend, although he executed a release before the assignees had declared or paid a dividend, and a surplus remained after paying the first class of creditors.

In Sheepshanks v. Cohen,[3] the facts were as follow: An assignment was made by A. B. of all the effects belonging to the firm of Y. & B. or to B. B. & Co., or to B. B. in his individual capacity in trust, to pay such creditors of Y. & B. and of B. B. & Co. as should execute a release of their claims against the said firm of Y. & B. and against the said B. B. & Co. within a certain time. The plaintiff, who appeared as a creditor of B. B. & Co. executed a release of all claims against B. B. & Co., without mentioning the firm of Y. & B. The court held the release to be insufficient.

In Beckwith v. Brown[4] (a Rhode Island case), the as-

[1] Matlack's Appeal, 7 W. & S. 79.
[2] 14 S. & R. 35.
[3] 7 S. & R. 510.
[4] 2 R. I. 311.

signment provided, by its first three clauses, for the payment of certain preferred debts, and, by its fourth clause, for the payment of those not preferred; and concluded with a proviso that the creditors should execute a full discharge of their claims to the assignor, as a condition of taking under the assignment, and that in case any creditor should neglect to execute such discharge, his dividend should result to the assignor. It was held that the provision for the return of the dividends of the non-releasing creditors applied to all the classes, and that, therefore, where one of the preferred debts had been paid without a release by the creditor, a releasing creditor of a subsequent class was not entitled to have such sum returned and applied to the payment of his debt.

In a case in New York, where an assignment provided that should there not be sufficient to pay the debts in full, the assignees might compromise as to the same, and require discharges on payment of a dividend, it was held that this did not compel the creditors to release the whole of their demands before they could take a dividend.[1]

§ 315. *Authority to Assignee.*—An authority given to assignees, in an assignment, "to manage and improve" the assigned property, is not to be construed, in the absence of anything else in the instrument favoring such a construction, as empowering the assignees to retain the assigned property for the purpose of erecting buildings and making alterations and repairs upon the real estate, and thus to hinder, delay, and prevent creditors from collecting their just debts.[2]

Where an assignment empowered the assignee to sell in such manner as he might consider expedient, and most for the interest of all parties, it was held that this authorized him to sell on a credit.[3] But where the direction to the

[1] Jewett v. Woodward, 1 Edw. Ch. 195.
[2] Hitchcock v. Cadmus, 2 Barb. S. C. 381.
[3] Neally v. Ambrose, 21 Pick. 185.

assignee was, to sell the assigned property "in such manner as he shall deem best and most for the interest of the parties concerned, and convert the same into money," it was held that this did not authorize a sale on credit.[1] And where the assignee was directed to sell in such manner and at such reasonable times as should seem proper to him, it was held that this did not authorize him to sell at retail and on credit, nor to send to agents to sell on commission.[2]

In a case in New York, before the vice-chancellor of the first circuit, the facts were these. N. G. C. owed the Manhattan Company, and on the 15th December, 1836, gave them his bond and a mortgage on real estate. On the 12th March, 1841, they foreclosed, sold, and bought in; and there was a deficiency for which (under a transcript of their decree) they issued a *fi. fa.*, which was returned *nulla bona*. On the 9th October, 1838, the said N. G. C. had made a deed of trust embracing the mortgaged premises, upon trust for the trustee to sell subject to mortgages, or free from incumbrances, and paying them off out of purchase money, and in the meantime collect rents; and after payment of taxes and other ordinary charges, upon trust to pay, first, the Greenwich Bank a specified sum; and afterwards certain other creditors. The trustee collected and held rents; and the Manhattan Company now filed their bill, claiming them to make up the balance due them under the foreclosure. It was held (on a general demurrer interposed), that the rents which the trustee received were not a trust fund to keep down interest, and that they belonged to the Greenwich Bank, and should be paid in part of their debt.[3]

§ 316. *Liability of Trustee.*—A provision in a deed of assignment, that the trustee shall be liable only for his own defaults, and not for the acts of his agents, must, on its face, be understood to import that he shall not be liable for the

[1] Clark v. Fuller, 21 Barb. 128.
[2] Meacham v. Sternes, 9 Paige, 398.
[3] Manhattan Company v. Greenwich Bank, 4 Edw. Ch. 315.

acts of such agents as are necessary to enable him to execute the trust, selected in good faith, with a due regard to their fitness, and with a proper supervision exercised over them.[1]

§ 317. *Effect of Release Subsequent to the Assignment.*—The following case was decided in the New York Court of Appeals. The maker of a note made an assignment to one of the holders, for the benefit of his creditors, in which the indorser was named and preferred as a creditor, to the amount of the note, and the holders were named and preferred as creditors on another account, but were nowhere set down as creditors in respect to the note. The holders, in conjunction with other creditors, afterwards executed to the maker an instrument referring to the assignment, and agreeing in consideration thereof and of one dollar, to discharge the maker from *all claims and demands*, existing in their favor respectively against him, over and above what they might realize under the assignment, on his agreeing at the same time to pay the balance of their debts in seven years; and the maker at the same time gave to the holders his written promise to pay such balance in seven years. It was held by the court (three judges dissenting), that the claim of the holders to recover the note of the maker, was not discharged or suspended, the instrument being regarded as only applicable to their other demands against the maker; and it was therefore further held that their right to recover against the indorser was not affected by such instrument.[2]

§ 318. *Construction of Particular Words.*—The word "goods" is *nomen generalissimum;* and, when construed in the abstract, the term will embrace all the personal estate of a testator, as bonds, notes, money, plate, furniture, &c. And the effect of the words "goods and chattels" is the same in

[1] Ashurst v. Martin, 9 Port. 566; and see Litchfield v. White, 3 Sandf. S. C. 545.

[2] Coddington v. Davis, 1 N. Y. 186.

a deed of assignment for the benefit of creditors, unless there is something in the instrument indicative of an intention to restrict the general import of the words.[1]

The word "claim" has been defined—"a challenge by a man, of the property ownership of a thing which is wrongfully detained from him." Hence, the right to recover against the plaintiff, in a replevin suit, the value of the property which has been delivered to him on the writ of replevin, together with damages for its seizure, is a *claim* against such plaintiff, and will pass under a general assignment made of all dues "and claims" by the defendant in such suit.[2]

The words "personal and mixed," as we have seen before, limit the assignment to personal estate.[3]

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[1] Dowdel v. Hamm, 2 Watts, 63, Rogers, J.

[2] Jackson v. Losee, 4 Sandf. Ch. 381. As to the construction of the word "terms," in the clause empowering the assignee to sell the assigned property, see Hutchinson v. Lord, 1 Wis. 286, Crawford, J.; Id. 313-315.

[3] Rhoads v. Blatt, 84 Penn. St. 31; see *ante*, p. 460.

CHAPTER XXV.

FRAUDULENT AND VOID ASSIGNMENTS.

§ 319. The terms *fraudulent* and *void* are constantly associated in the law of assignments, as descriptive of the qualities of assignments in certain cases; and this use of the terms is justified by the actual relation of the qualities themselves which they express—which is ordinarily that of cause and effect. In the great majority of cases, assignments become *void* or are avoided on the ground of *fraud;* but they may be avoided on other grounds also. An assignment may be void, without being positively fraudulent, as where it fails to comply with some merely formal statutory requisition. On the other hand, an assignment may be fraudulent, without being necessarily actually void. A fraudulent assignment, though always voidable by creditors, may become operative, as where it is accepted and confirmed by their acts.[1] And the term "void," even in its most peremptory forms of application (as in statutes declaring the effect of assignments in certain cases), is constantly construed to mean nothing more than "voidable."[2]

§ 320. *Good Faith—Fraud.*—The great and indispensable requisite in all voluntary assignments by debtors is *good faith;* the great and fatal objection—*fraud*, or the intent to defraud creditors.[3] It is not enough that an assignment

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[1] A deed of assignment, fraudulent on its face as to creditors, is capable of confirmation by them; and after the deed has been executed, and the assenting creditors have been paid from the effects assigned, the transaction, as to them, will not be disturbed. White v. Banks, 21 Ala. 705; and see Merrill v. Englesby, 28 Vt. 150; Geisse v. Beall, 8 Wis. 367; Hone v. Henriques, 13 Wend. 240; Bodley v. Goodrich, 7 How. 277.

[2] Merrill v. Englesby, *ubi supra;* Edwards v. Mitchell, 1 Gray, 239, 242; Bigelow v. Baldwin, Id. 245, 247.

[3] McIntyre v. Benson, 20 Ill. 500.

be for valuable consideration; it must be *bona fide* also.[1] But we have already seen that in all assignments for the payment of debts, a consideration is, in our law, usually implied from the nature and object of the transfer itself.[2] This leaves the *bona fides* of the transaction in great prominence and importance.

By the term "good faith," as commonly understood in our law, and in the civil law from which it has been derived,[3] is meant sincerity or honesty of purpose, as distinguished from what was termed in the language of the old law of England, "covin," "collusion," and "guile," or fraud in the natural or popular sense—that is, contrivance, artifice, or actual dishonesty on the part of a debtor, involving conduct partaking so far of a criminal character as to admit of being made the subject of punishment. That the term, as thus defined, expressed, from an early period in English law, the quality specially required in conveyances affecting creditors, appears from statutes and decisions which will be referred to in the course of the present chapter. Lord Mansfield, in a leading case,[4] drew a clear distinction between a *bona fide* transaction and "a *trick* or contrivance to defeat creditors;" and in an important statute against fraudulent conveyances, to be presently commented on, it was expressly declared that if a conveyance by a debtor was upon good consideration and *bona fide*, the statute had no application to it.[5]

But according to the views now extensively entertained in the United States, as illustrated by numerous decisions in our courts, the term "good faith" hardly expressed the precise nature of the quality required in these transfers by

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[1] Lord Mansfield, in Cadogan v. Kennett, Cowp. 434; 1 Story's Eq. Jur. § 353; Marshall, C. J., in United States v. Hooe, 3 Cranch, 73; Wilde, J., in Johnson v. Whitewell, 7 Pick. 71, 74; United States v. Bank of the United States, 8 Rob. (La.) 262; Glenn v. Randall, 2 Md. Ch. Dec. 220; Grover v. Grover, 3 Id. 29; Glenn v. McNeal, Id. 349; Wright v. Linn, 16 Tex. 34; Wheeler, J., Id. 42.

[2] In New York it is expressly declared by statute, that no conveyance shall be adjudged fraudulent against creditors solely on the ground that it was not founded on a valuable consideration. 3 Rev. Stat. (7 ed.) p. 2329, § 4.

[3] See Brissonius De Verb. Signif. vocc. *bona fides*, *bona fide*.

[4] Cadogan v. Kennett, Cowp. 432, 434.

[5] See *post*, p. 481.

debtors. Many assignments, admitted to be made without any actual dishonesty of intent as against creditors, have yet been set aside on the ground of fraud, that is, of legal fraud, as being contrary to what is known as "the policy of the law."[1] And to such an extent has this been carried, that clauses introduced into assignments by the draftsmen, without any communication with the assignor, and merely with a view to greater supposed precision of expression and more entire conformity with long-established precedents, have been made the sole grounds of decisions declaring the instruments containing them fraudulent and void as against creditors.

§ 321. *The Statute of* 13 *Elizabeth, c.* 5, *and its Re-enactments.*—The rules by which the courts are now generally governed in pronouncing upon the character of assignments, as being fraudulent and void against creditors, are founded upon certain statutes, called statutes "against fraudulent conveyances,"[2] being re-enactments in various forms of the celebrated English statute of 13 Elizabeth, c. 5.[3] Allusion has already been made to this statute, at the commencement of this work. The present chapter will be devoted, in part, to a critical examination of its most important provisions, and the construction which has been given to them, and to their re-enactments in the United States.

The entire statute, with the exception of its purely obsolete portions, is in the following words:

§ 322. "For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practiced in these days, than hath been seen or heard of heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions,

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[1] See the opinion of Randall, J., in Ex parte Breneman, Crabbe, 456, 463.

[2] Sometimes called statutes "against fraudulent intents in alienation," and statutes "against alienations with intent to defraud."

[3] Made perpetual by statute, 29 Eliz. c. 5.

have been and are devised and contrived of *malice, fraud, covin, collusion or guile, to the end, purpose and* INTENT TO DELAY, HINDER, OR DEFRAUD CREDITORS and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs; not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

"2. Be it therefore declared, ordained and enacted, by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or of any of them, by writing or otherwise; and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's majesty's reign that now is, or at any time hereafter to be had or made, *to or for any* INTENT *or purpose before declared or expressed*, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices, as is aforesaid, are, shall, or might be in any wise disturbed, hindered, delayed or defrauded), to be clearly and utterly void, frustrate and of none effect; any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

"3. And be it further enacted by the authority aforesaid,[1] That all and every the parties to such feigned, covinous or

[1] This section is given for the purpose of showing the penal character of the statute, remarked upon *post*, in this chapter.

fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed, and being privy and knowing of the same or any of them, which at any time after the tenth of June next coming shall, wittingly and willingly, put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had, or made *bona fide*, and upon good, firm consideration; or shall alien or assign any lands, tenements, goods, leases or other things before mentioned, to him or them conveyed as is aforesaid, or any part thereof; shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits of or out of the same; and the whole value of the said goods and chattels; and also so much money as is or shall be contained in any such covinous and feigned bond; the one moiety whereof to be to the Queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid, to be recovered in any of the Queen's courts of record, by action of debt, bill, plaint, or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; and also, being thereof lawfully convicted, shall suffer imprisonment for one half year, without bail or mainprize.

"6. Provided also, and be it enacted by the authority aforesaid, That this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of

such covin, fraud or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding."

§ 323. This statute, as observed by Mr. Justice Story,[1] has been universally adopted in American law, as the basis of our jurisprudence on the same subject.[2] In some of the States it has been incorporated into the code of statute law without change, and is still referred to as "the statute of Elizabeth." In others, it has been re-enacted almost in terms, the purely obsolete portions alone being omitted. In others, on the contrary, its characteristic language has been entirely dispensed with, and its provisions condensed into a few sentences.

§ 324. *The New York Statute.*—In New York, the provisions of the statute of 13 Elizabeth were re-enacted, almost literally, by the act of February 26th, 1787,[3] the

[1] 1 Story's Eq. Jur. § 353; see 4 Kent's Com. [462, 463] 510.

[2] N. Y.—3 Rev. Stat. (7th ed.) p. 3329. Ala.—Rev. Code of Ala. (1867), p. 412, § 1865. Ark.—Rev. Stat. (1874), p. 562, § 2954. Cal.—Civil Code, Hittell (§ 3439), § 3439. Col.—R. S. (1867), p. 340. Conn.—Gen. Stat. (Rev. of 1875), p. 345, c. 111. Ga.—Code of Ga. (ed. 1873), § 1952. Ill.—Rev. Stat. (1881), p. 740, § 4. Ind.—1 Rev. Stat. (G. & H. 1870), p. 352; R. S. of Ind. (1881), § 4930. Kans.—Comp. Laws (1881), p. 464. Ky.—Gen. Stat. (1881), p. 488. Mich.—2 Comp. Laws (1871), p. 1460. Minn.—Stat. of Minn. (1878), p. 544, § 18. Miss.—Rev. Code (1880), p. 371, § 1293. Mo.—R. S. (1879), § 2497. Neb.—Comp. Stat. (1881), p. 289, § 17. Nev.—Comp. Laws (1873), vol. I, p. 95, art. 297. N. Ca.—Battle's Rev. p. 430. N. J.—Rev. Stat. (1878), p. 446. Ohio—R. S. (1880), § 4196. Oregon—Gen. Laws (1874), p. 528, § 51. Penn.—Purdon's Dig. (Brightley), p. 1486, § 1. R. I.—Pub. Stats. (1882), p. 442, § 1. S. Ca.—Rev. Stat. (1873), p. 425, § 15. Tenn.—Stat. of Tenn. (1871), § 1759. Tex.—R. S. (1879), p. 363, art. 2465. Vt.—Rev. Laws (1880), § 4155. Va.—Code (1873), p. 896, c. 114. W. Va.—R. S. (1879), ch. 96, § 1 (ch. 74 of Code, § 1). Wis.—R. S. (1878), p. 657, § 2320.

[3] 1 Rev. Laws (ed. 1813), 75–79. This act includes the provisions of the 27 Eliz. c. 4, and several other English statutes. The following are the words of the act, so far as it copies the provisions of the English statute given in the text:

"II. And for the avoiding and abolishing of all feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements, as of goods and chattels, which have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose and *intent to delay, hinder or defraud creditors* and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures and demands, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without which no commonwealth or civil society can be maintained or continued,—*Be it further enacted by the authority aforesaid*, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the

phraseology being carefully preserved, and only such portions omitted as were, in their nature, wholly inapplicable. The Revised Statutes condensed them into the following sections:

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the *intent to hinder, delay, or defraud creditors*, or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every

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same lands, tenements, hereditaments, goods or chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution, at any time had or made, or hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his, her, or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, and demands, by such guileful, covinous, or fraudulent devices and practices as aforesaid, are or shall, or may be, in any wise disturbed, hindered or defrauded), to be clearly and utterly void, frustrate, and of none effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

"IV. *And be it further enacted by the authority aforesaid*, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, lease, charge, conveyance, bonds, suits, judgments, executions and other things before expressed, or being privy or knowing of the same, or any of them, who at any time hereafter shall wittingly and willingly put in use [ure] avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide*, and upon good consideration, or shall alien or assign any the lands, tenements, goods, leases, or other things before mentioned, to him, her, or them conveyed as aforesaid, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits, of or out of the same, and the whole value of the said goods and chattels, and also so much money as is or shall be contained in any such covinous and feigned bond; the one moiety whereof to be paid to the people of the State of New York, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges, and other things aforesaid; to be recovered in any court of record, by action of debt, bill, plaint or information.

"VI. *Provided always, and be it further enacted by the authority aforesaid*, That this act or anything therein contained, shall not extend or be construed to impeach, defeat, make void, or frustrate, any conveyance, assignment of lease, assurance, grant, charge, lease, estate, interest or limitation of use or uses, of, in, to or out of any lands, tenements or hereditaments, goods or chattels, at any time heretofore had or made, or hereafter to be had or made, upon or for good consideration, and *bona fide*, to any person or persons, bodies politic or corporate, not having at the time of such conveyance or assurance to him, her or them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; * * * * anything before in this act to the contrary in any wise notwithstanding."

bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded, shall be void."[1]

"Every person being a party to any conveyance or assignment of any estate or interest in lands, goods, or things in action, or of any rents or profits issuing therefrom, or to any charge on any such estate, interests, rents or profits, made or created with *intent* to defraud prior or subsequent purchasers,[2] or to *hinder, delay, or defraud creditors* or other persons; and every person being privy to, or knowing of such conveyance, assignment, or charge, who shall willingly put the same in use,[3] as having been made in good faith, shall, upon conviction, be adjudged guilty of a misdemeanor."[4]

§ 325. The statute of 13 Elizabeth, c. 5, has always been considered by high authority as declaratory of the common law,[5] the antipathy of which against fraud has already been

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[1] 3 R. S. (7th ed.) p. 2329. This section has been re-enacted almost *verbatim* in Michigan (Rev. Stat. ed. 1838, p. 331; c. 3, § 1; Comp. Laws (1871), p. 1460); Wisconsin (Rev. Stat. ed. 1849, p. 390, § 1; 2 Taylor (1871), p. 1257, § 1; R. S. (1878), p. 657, § 2320); Colorado, R. S. (1867), p. 340; Oregon, Gen. Laws (1874), p. 523, § 51.

[2] This clause has been taken from the statute 27 Eliz, c. 4.

[3] The word here written *use* is, in the English statute, *ure*, for which *use*, however, is frequently substituted in the modern books, possibly on the idea of its being a misprint. But *ure* is a genuine Law French word (appropriated, like many others in the old English law, without translation or change), having the sense of *effect*, and constituting the root of the still familiar word *enure;* as will at once appear from the old French phrase, *mise en ure*, of which "put in ure," is, in part, a literal translation.

[4] 2 Rev. Stat. (2d ed.) [690] 676, § 8 (7th ed. p. 2515). This section, which embraces the *penal* provisions of the old statute, has been entirely separated from the other, which embodies the *remedial* provisions. A similar course was pursued in revising the statutes of Vermont and Illinois. Rev. Stat. of Vt. (ed. 1870), p. 672, tit. 34, c. 118, §§ 32, 33; Rev. Laws (1880), §§ 4155, 4156. Rev. Stat. of Ill. (ed. 1881), p. 741, and p. 468, § 122. In New Hampshire, Maine and Iowa the penal portion only seems to have been enacted. Rev. Stat. of N. H. (ed. 1878), p. 620, §§ 2, 3. Rev. Stat. of Me. (ed. 1871), p. 858, c. 126, § 3. Rev. Code of Iowa (1880), § 4074. And see the Pennsylvania act of March 18, 1860, Purdon's Dig. (Brightley, 10th ed.), p. 351, § 188. In Connecticut, the two provisions are united. Stat. (ed. 1854), p. 570 (ed. 1875), p. 345. As to Mass. see Pub. Stat. (1882), pp. 837, 1098.

[5] Lord Coke, as Mr. Roberts observes, has in three different places remarked upon the force of the word "declare," with which the enacting part of the English statute is introduced, as implying a legislative recognition of the common

noticed;[1] its object being to give that law greater efficiency by placing additional obstacles in the way of dishonest and fraudulent debtors.[2] It will be seen that the terms of the statute embrace acts done with an "intent to *hinder and delay*" as well as to "*defraud* creditors." These, indeed, may be considered its emphatic words, having been, more than any others, the subject of judicial construction and application, and they have been carefully retained in nearly all the American statutes.[3] They have become, in short, the familiar *test words* by which the validity of voluntary assignments is now every day tried in our courts. The fact that the three words "delay," "hinder," and "defraud," have been in so many instances retained without the least change, while the language of other clauses in immediate connection with them has been condensed to the utmost degree,[4] shows that each of these words was supposed to have a peculiar and appropriate meaning which could not be dispensed with, and that "delaying and hindering" creditors, was not considered altogether synonymous with "defrauding" them. In their actual application, they are frequently taken together (that is, *defraud* is used in connection with the other words), but

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law. Twyne's Case, 3 Co. 82 b; Co. Litt. 76 a, 290 b; Roberts on Fraud. Con. 8, 9; see Kent's Com. [515] 665.

[1] Lord Mansfield, in Cadogan v. Kennett (Cowp. 434), said: "The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4.

[2] Mr. Roberts has the following remarks on this subject: "The genius of the common law, it is true, opposes itself to every species of fraud, so that nothing can have legal validity which has apparent fraud in its composition; but as the common law is tender of presuming fraud from circumstances, and expects that it be manifest or plainly inferable, statutes have been framed of preventive efficacy, whose object it has been to embarrass deceitful contrivances, by requiring, as the characteristics of honesty and truth, certain badges or distinctions which it is impossible or difficult for fraud to assume." Rob. Fraud. Conv. 11, 12; see Bump on Fraud. Conv. pp. 66, 67.

[3] The Ohio statute is an exception; the single word "defraud" alone being used. Swan's Stat. (ed. 1841), p. 422, c. 52, § 2; Id. (ed. 1854), p. 435, c. 49, § 2; R. S. (1880), § 4196; see the observations of Bartley, J., in Hoffman v. Mackall, 5 Ohio St. 133. But see act of 1859, Rev. Stat. (S. & C.) p. 713, § 85.

[4] Thus, in the New York statute, all the words descriptive of the character of the conveyance are omitted; the words "devised and contrived" reduced to "made;" the words "end, purpose, and intent," abridged to "intent," and the like.

quite as often separately, affording two grounds on which assignments are constantly assailed in the courts; on that of *hindrance* and *delay*, and on that of *fraud*. These seem, indeed, to present two general points of view in which the provisions of the statute may be considered; and it is accordingly proposed, in what follows, to examine, first, the nature of the *delay* and *hindrance*, or of the *intent to delay* and *hinder*, contemplated by the statute, and on account of which it declares conveyances by debtors void; and then to consider the nature of *fraud*, or the *intent to defraud*, against which its provisions seem to be more distinctly directed.

§ 326. *Hindrance and Delay of Creditors.*—In the case of Meux v. Howell,[1] in the Court of King's Bench (which was the case of a judgment confessed by a debtor for the benefit of all his creditors, and which was assailed through the medium of a *qui tam* action as covinous and fraudulent), Lord Ellenborough, in delivering his opinion sustaining the judgment, remarked as follows: "It is not *every* feoffment, judgment, &c., which will have the *effect* of delaying or hindering the creditors of their debts, &c., that is *therefore* fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors. Every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, &c., must be *devised of malice*, fraud, or the like, to bring it within the statute." "The act of parliament," his lordship further observed, "was meant to prevent deeds, &c., fraudulent in their *concoction*, and not merely such as, in their *effect*, might delay or hinder other creditors." In the case of Pickstock v. Lyster,[2] even the actual intent to defeat a particular creditor of his execution

[1] 4 East, 1, 13.

[2] 3 M. & S. 371; and this case was followed in Reed v. McIntyre, 98 U. S. 507.

was not considered, of itself, sufficient to bring the case within the statute, the assignment being for the benefit of all the creditors.

§ 327. The views of Lord Ellenborough appear to be fully borne out by the words of the English statute, the very verbiage of which furnishes an important aid to its construction. The conveyances, &c., which it declares void and seeks to abolish, are designated as "feigned, covinous and fraudulent," such as were "devised and contrived of malice, fraud, covin, collusion or guile; to the end, purpose, and intent to delay, hinder or defraud." The words "malice, fraud, covin, collusion or guile," are among the most important ones in the whole statute; their very redundancy evincing a desire on the part of the legislators to express, beyond the possibility of misconstruction, the *quality* of the intent which it was their object to declare unlawful. That the practices at which it was aimed involved a high degree of moral fraud or actual *dishonesty*,[1] calling not only for repression but absolute *punishment*, appears from the third section, by which the parties to such conveyances and transactions are made to incur the penalty and forfeiture of one year's value of the lands, tenements, &c., and the whole value of the goods and chattels so conveyed; and the whole amount of any bond given contrary to the statute; and also the penalty of one

[1] This may be gathered from various parts of the statute. Thus, the preamble (which in this case is of unusual importance) describes the practices in question as tending not only to the hindrance of the due course of justice, but "to the overthrow of all true and plain dealing between man and man." In the second section, they are described as "guileful, covinous and fraudulent devices and practices," founded upon "pretense, color, feigned consideration," &c. In the third section, the designation of "feigned, covinous and fraudulent," is again applied to the feoffments, conveyances, &c., which are prohibited; and they are contrasted with such as are "true, simple, *bona fide*, and upon good, firm, consideration." The bonds prohibited are also described as "covinous and feigned." The language of the kindred statute of 27 Elizabeth, c. 4, which also was directed, in terms, against fraudulent and covinous conveyances, though in behalf of a different class of persons, is even more explicit in describing the character of these conveyances. They were such as were "meant and intended," by the parties who made them, "to be fraudulent and covinous *of purpose* and intent to deceive" purchasers; "or else by the *secret intent* of parties to be to their own proper use, and at their free disposition; colored, nevertheless, by a feigned countenance and show of words and sentences, as though the same were made *bona fide* for good causes, and upon just and lawful considerations."

half year's *imprisonment*, "without bail or mainprize."[1] Hence it was well observed by Mr. Justice Grose, in Meux v. Howell, that the statute, in its whole frame, was calculated to prevent certain frauds, and to punish those who were guilty of them. It was, in fact, a *penal* statute of a very stringent character, and the case just cited was itself (as already observed) a *qui tam* action to recover the penalty given by it. This explains the very strong expression of the learned judge last named, in the course of delivering his opinion: "It makes one shudder to think that persons who appear, like the defendants, to have acted most honestly, should have been in any hazard of being subjected to punishment for having endeavored to procure an equal distribution of their debtor's effects amongst all his creditors."[2]

§ 328. The views of Lord Ellenborough, in Meux v. Howell, have received the sanction of several of our own courts. In New York, they were expressly recognized and applied by the Supreme Court, in the case of Wilder v. Winne,[3] the facts of which were similar; the court holding that if a judgment be valid in its concoction, that is *bona fide* and upon sufficient consideration, though execution be taken out and enforced *with a view to delay and hinder* creditors, and it have that effect, yet it is not fraudulent within the statute; and that the plaintiff was not therefore liable to the penalty imposed by it; and on error to the Court of Errors, the decision was affirmed.[4] In Louisiana, in the case of The United States v. The Bank of the United

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[1] By the Maine statute, the parties are punishable by fine not exceeding one thousand dollars, and imprisonment less than one year. Rev. Stat. (ed. 1857), p. 691, c. 126, § 2; ed. 1871, p. 858, c. 126, § 8. And see the Pennsylvania act of March 31, 1860, Purdon's Dig. (Brightley, 10th ed.) p. 351, § 188.

[2] 4 East, 15. The penal character of the New York statute was also dwelt upon by the Court of Appeals (Gardiner, J.), in Nicholson v. Leavitt (6 N. Y. 510, 516), and by the Supreme Court (Roosevelt, J.), in Curtis v. Leavitt, 17 Barb. 309, 317.

[3] 6 Cow. 284.

[4] Wilder v. Fondey (or Winney), 4 Wend. 100. These decisions were under the statute as it stood before the revision, being almost a literal transcript of the English statute, including the provision imposing the penalty of forfeiture upon the parties to the conveyance, judgment, &c.

States,[1] it was observed by Mr. Justice Garland, almost in the words of Lord Ellenborough, that "it is not every conveyance that has the effect of delaying or hindering creditors that is, in itself, fraudulent. In some degree, it is the effect of every assignment of a debtor's property, for the benefit of creditors, to produce hindrance and delay." The learned judge then referred to the case of Sexton v. Wheaton,[2] in which the Supreme Court of the United States quote the words of the English statute, for the purpose of determining what conveyances were to be considered as falling within its provisions. In Mississippi, in the case of Farmers' Bank v. Douglas,[3] it was said: "Almost every mortgage and deed of trust tends, in some degree, to hinder and delay those creditors who are not provided for; but it does not thence follow that they are of necessity fraudulent." And in Ingraham v. Griggs,[4] in the same State, it was observed: "A deed may delay creditors and not be void, where such delay is not its principal object." In North Carolina, in the case of Hafner v. Irwin,[5] the language of the statute was critically examined, and very ably applied, by Gaston, J., from whose opinion the following is an extract: "Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute of fraudulent conveyances. It is not embraced within its words, which apply only to such as are *contrived of malice, fraud, collusion, or covin*, to the end, purpose, and intent to delay, hinder, and defraud creditors." In Virginia, in the case of Dance v. Seaman,[6] it was held by the court (Allen, P.): "The fact that creditors may be delayed or hindered, is not, of itself, sufficient to vacate such a deed, if there is absence of

[1] 8 Rob. (La.) 402.
[2] 8 Wheat. 229.
[3] 11 Sm. & M. 469, 539.
[4] 13 Sm. & M. 22.
[5] 1 Ired. L. 490.
[6] 11 Gratt. 778, 782.

fraudulent intent. Every conveyance to trustees interposes obstacles in the way of the legal remedies of the creditors, and may, to that extent, be said to hinder and delay them." The same distinction between the result and the object of an assignment was made in the Florida case of Bellamy v. Bellamy's Adm'r.[1] In Michigan, in the case of Hollister v. Loud,[2] the language and object of the statute were commented on by Wing, P. J., from whose opinion the following are extracts: "It must be shown, then, by the complainant, that the parties to the deed entered into it as a device for the purpose of hindering, delaying, or defrauding the creditors of the grantors; that it was not intended by the parties to it, and especially the assignors, to carry its provisions into effect *bona fide*, but that it was intended as a means to keep the property from the creditors, or this creditor in an especial manner, and from motives of malice or guile; or that the deed of assignment contains provisions or trusts which are prohibited by law, on account of which, it is to be deemed fraudulent and void.[3] * * If the effect of a conveyance be to hinder, delay, or obstruct creditors, it is not therefore void. * * To render it fraudulent, it must be done, with the intent to hinder, delay, or defraud; but if made with no such intent, but with honest motives, and with the higher or nobler intent and purpose of paying all equally, or of providing for those who are the most meritorious, it will be sustained. * * The object of the statute was not to prevent such conveyances as might operate to hinder or delay creditors, but only such assignments as were in their *inception* and *intention* fraudulent and void. It is the fraudulent intention, the *mala mens*, with which the conveyance is made that constitutes the fraud against which the denunciations of the statute are directed."[4] In Indiana, in the case of Church v. Drummond,[5] the court (Stuart, J.), say: "Every assignment operates more or less to delay creditors. If mere

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[1] 6 Fla. 62, 102.
[2] 2 Mich. 309.
[3] 2 Mich. 313.
[4] 2 Mich. 316.
[5] 7 Ind. 17.

delay of creditors were conclusive on the question of fraud, every assignment would be fraudulent."

In a case in Illinois,[1] it is said that "the placing of property in the hands of assignees for any other purpose than to distribute it or its proceeds among creditors, must necessarily have the effect to, in some degree, hinder and delay creditors in the collection of their debts." The assignment is valid only when it is made for the benefit of creditors by devoting the property fairly to the payment of debts, and not with a view to the debtor's own advantage.

In Ohio, in the case of Hoffman v. Mackall,[2] the language and object of the statute were commented on by Bartley, J., from whose opinion the following is an extract: "The effect of almost every assignment, even where creditors are to be paid *pari passu*, is, in one sense, to hinder and delay them in the collection of their debts, by withdrawing the property from the reach of any legal process to which they may wish to resort. This statute is to be construed according to its reasonable intent and object. And assignments, although designed manifestly to deprive particular creditors of speedy remedies at law, and thus hinder and delay them in the collection of their debts, or to deprive some of that full satisfaction of their debts, which by their superior diligence in prosecuting their suits, they would otherwise certainly have obtained, are upheld as valid and effectual. Although, in one sense, there is a manifest intent to hinder and delay one or more creditors, in such assignment, yet there is no intent to cheat or defraud them; and, by a reasonable construction, such hindrance and delay only as would operate as a fraud, and are designed as a fraud, come within the operation of the statute. When a man finds himself in failing circumstances, and unable to pay all his debts, he can do no act *more just and equitable* than to surrender and assign his property in trust for the benefit of all his creditors. In such

[1] Gardner v. Commercial Nat. Bank, 95 Ill. 298.

[2] 5 Ohio St. 124, 133, 134.

situation all the law can reasonably demand is a faithful application of all his property to the payment of all his debts; and when this object is accomplished by an assignment or deed of trust for the benefit of all his creditors, the hindrance and delay which may operate to the prejudice of particular creditors is simply an unavoidable incident to a just and lawful act. And such mere incident to such laudable act cannot be held to vitiate the transaction as fraudulent, until the maxim that equality is equity, in the distribution of the property of an insolvent, shall have been repudiated, and the highest act of justice which can be done by a debtor, in contemplation of insolvency, shall be deemed an act of dishonesty. If authority be necessary to sustain so plain a proposition, reference is made to Meux v. Howell, 4 East, 1; Wilder v. Winne, 6 Cow. 284, and 4 Wend. 100." In New York, it was held by the Court of Appeals, in Nicholson v. Leavitt[1] (Gardiner, J.), that where the delay to creditors necessarily *results* from a fair exercise of the debtor's right to make an assignment with preferences, it is not prohibited by any statute.

§ 329. In the case of Nicholson v. Leavitt,[2] in the Superior Court of the city of New York, the construction of the words of the statute now under consideration, was examined at great length by Duer, J., who delivered the opinion of the court. The following extracts from this opinion seem to claim a place under the present head. "It is not true, that where there is no evidence of a fraudulent intent, every assignment by an insolvent must be held to be void if the necessary effect of its provisions, or of any of them, is to hinder and delay the creditors, in the sense in which the words were understood by the counsel; for to assert this as the true construction of the statute, is to affirm that no valid assignment by an insolvent, of all his property in trust for

[1] 6 N. Y. 510, 516. The court in this case cite and approve Meux v. Howell and Wilder v. Winne; see also Bank of Silver Creek v. Talcott, 22 Barb. 550.

[2] 4 Sandf. S. C. 252, 284. The judgment in this case was reversed in the Court of Appeals, 6 N. Y. 510.

his creditors, has ever been made, or, so long as the statute shall remain in force, can be made. The *necessary effect* of every such general assignment, even where the creditors are to be paid *pari passu*, is to hinder and delay them in the collection of their debts, by withdrawing the property from the reach of any legal process to which they might wish to resort. Not only is such its necessary effect, but the *actual intent* of the debtor is to place the property beyond the immediate power and action of his creditors, by preventing them from obtaining any judgment by which it may be bound, or from issuing any execution or attachment under which it may be sold. He *means to hinder* the creditors from collecting their debts out of his property by any proceedings against himself as their debtor, *and to delay* them from receiving any portion of their debts until they shall become entitled to a dividend under the assignment; and the intent thus to hinder and delay them is not only to be *plainly deduced* from the nature of the trust, but not unfrequently is *confessed in its terms*. In fact, it was upon this very ground—the *apparent and certain intent* to hinder and delay the creditors—that originally the validity of a general assignment, although for the benefit of all the creditors without distinction, was not only seriously doubted, but seriously contested." The learned judge then refers to the case of Pickstock v. Lyster, already cited, and that of Braddock v. Watson,[1] as having established the validity of such assignments, notwithstanding the objections made against them.

[1] 3 Price, 6. Of these decisions it is, however, said, "It seems impossible to deny that they are a plain violation of the statute of frauds, if we look merely to the words of the statute, and understand them in their literal extent." To show this, the learned judge quotes the words of the present New York statute (remarking that those of the English statute, and of the former acts of our legislature upon the subject, are substantially the same), that "every assignment made with the intent to hinder, delay, or defraud creditors, &c., shall be void"—dwells on the apparent departure from them involved in the doctrine now established (that, although the intent to deprive all or particular creditors of their lawful suits, and hinder or delay them in the recovery of their just demands, is confessed or proved, still the assignment, if by its terms all the property which it embraces must be applied ratably or otherwise to the payment of all the debts, must be sustained)—and then offers the following explanation of this seeming departure; that, although in these cases the intent to *hinder and delay* the creditors is manifest, it is just as certain that there was *no intent to cheat* or defraud them; and the reasonable con-

§ 330. From the views expressed in the foregoing cases,[1] the rule of construction seems deducible—that, in order to bring an assignment by a debtor within the statute of *fraudulent* conveyances (at least in its original and unabridged form, and with reference to its professed title), on the ground of an *intent to hinder and delay*, there must be an intent to delay and hinder actually entertained by the debtor; and not only an *actual* intent, but a covinous or *fraudulent* one. But there is a class of cases which have established a very different rule of construction, constituting in some States the

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struction of the statute is, that it is only such a hindrance or delay as was intended to operate, or if permitted could operate, as a fraud upon the creditors, that was meant to be prohibited.

With deference to the opinion thus expressed, it may be observed that however applicable the explanation given may be to the present New York statute, and however necessary to reconcile with its language the decisions under it, it seems hardly called for in regard to the English cases remarked upon; nor do those cases, considered in the light of Meux v. Howell, and compared with the words of the English statute, appear to involve any violation of that statute. A marked distinction between the New York statute and those from which it was condensed by the legislature, is the entire absence of all the language so laboriously inserted in the earlier laws, and which served to define for the courts the *quality* of the intent contemplated. More will be said on this subject on another page.

[1] The rule as laid down in the text has been ratified and confirmed by several later decisions. In The State v. Benoist (37 Mo. 500), it was said (Holmes, J.), "An intent to *defraud* as well as to hinder and delay must appear in order to make it (the assignment) void." See also Gates v. Labeaume, 19 Mo 17; Potter v. McDowell, 31 Mo. 62.

But the words of the Missouri statute are "hinder, delay or defraud;" and it was held in Crow v. Beardsley (68 Mo. 435), that either intent was sufficient to avoid the assignment. Hence an instruction to the jury that they should find for the defendant unless the conveyance was made to hinder, delay *and* defraud creditors, was erroneous.

The rule of State v. Benoist, seems to prevail also in Illinois. Myers v. Kinzie, 26 Ill. 30. So in the case of Bailey v. Mills (27 Tex. 434), it was said, "It is not a sound objection to an assignment that it operates to hinder and delay creditors, for this is the usual and almost invariable consequence of an assignment." The same opinion was expressed in Carlton v. Baldwin (22 Tex. 724). So in True v. Congdon (44 N. H. 48): "But if such assignment was made *bona fide*, and with no such fraudulent intent, it would be entirely immaterial what its effect might be. The effect of all assignments at common law or under our State statute, may be, and perhaps generally is, to delay and hinder creditors somewhat in the collection of their debts. And this effect might follow from an assignment made legally and *bona fide* as often as in any other case, but such effect can have no tendency to make the assignment void as against creditors." In Hefner v. Metcalf (1 Head, 578), the court say, "the words 'hinder and delay' are to be taken in their legal or technical, and not in their literal sense, or no deed could stand when creditors were not provided for." And see Shackelford, J., in Rindskoff v. Guggenheim, 3 Cold. (Tenn.) 284; and see Christopher v. Covington, 2 B. Mon. 357; Morgan v. Bogue, 7 Neb. 429.

present law of the land. These remain to be next considered.

It was said by Lord Mansfield, in Cadogan v. Kennett,[1] that the statutes of Elizabeth "cannot receive too liberal a construction, or be too much extended in suppression of fraud;" and this idea seems to have been very fully acted on by the courts since that decision, especially in applying the words of the statute now under consideration.[2] Mr. Roberts has remarked upon this action of the courts in the earlier cases, which he describes to have been exerted by a process of "legal artificial presumption," founded in a great degree on views of general expediency, or public policy, which he approves. "Where experience," he observes, "has pointed out a successful engine of fraud, the very use of that engine is made, in some cases, to supersede inquiry into intention, by being itself turned into a strong presumptive indication of fraudulent design."[3]

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[1] 2 Cowp. 432.

[2] It may appear strange that the statute of Elizabeth should have been so liberally construed by the courts, in aid of the equitable remedies of creditors, when they are both, in their terms, *penal statutes* of a very stringent kind; and, in that view, calling, according to the well known rule, for a *strict* construction. It will be seen, however, that both statutes partake of a double quality, being partly remedial and partly penal; and it is in view of this double quality that they have been held to admit of the application of two opposite principles of construction. Sir William Blackstone has alluded to the apparent inconsistency involved in this proposition, in the following passage of his Commentaries: "Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule [that penal statutes must be construed strictly], most statutes against frauds being, in their consequences, penal. But this difference," he proceeds to explain, "is here to be taken: where the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but where the statute acts upon the offense, by setting aside the fraudulent transaction, here it is to be construed liberally." The learned commentator then refers, in illustration of the last proposition, to this very statute of 13 Eliz. c. 5, which, under the words "to defraud creditors *and others*," was held to extend to a gift made to defraud the queen of a forfeiture. 1 Bl. Com. 88, 89. Mr. Sergeant Stephen, in his New Commentaries, also speaks of statutes "of a mixed kind, which contain both remedial and penal provisions, the former of which will be constructed with more indulgence than the latter." 1 Steph. Com. 73; Platt v. Sheriffs of London, Plowd. 36; Bones v. Booth, W. Black. 1226. Mr. Roberts observes under this head; "The principle of expounding beneficially and equitably all statutes against fraud, is agreeable to those strong maxims of resistance to all shapes of covin and deceit manifested by our legal and equitable jurisdictions. Notwithstanding these laws are greatly penal, the rule still holds of giving them an extended and liberal exposition. *In his enim quæ sunt favorabilia animæ, quamvis sunt damnosa rebus, fiat aliquando extensio statuti.*"—Rob. Fraud. Conv. 542, 543; Wimbish v. Tailbois, Plowd. 39; 1 Co. 131; Fermor's Case, 3 Co. 78; Fitzherbert's Case, 5 Co. 80.

[3] Rob. Fraud. Conv. 32. "The hardship of such presumptions," he further

§ 331. Very similar views seem, especially of late, to have influenced the courts in some of our own States, in their action on the subject of voluntary assignments by debtors, which, from their repeated use as instruments of fraudulent alienation, have come to be judged rather in the light of their *general tendency* as detrimental to the interests of creditors, than of any really fraudulent or dishonest design established against the debtor in any particular case. Hence, assignments have been repeatedly adjudged to be void on the ground of the mere "intent to hinder and delay," as distinct (otherwise than by judicial implication) from the "intent to defraud." Thus, in Alabama, a conveyance with intention to hinder or delay creditors in the collection of their debts, has been held void as against them, although on valuable consideration.[1] So in the case of Vernon v. Morton,[2] the Court of Appeals of Kentucky say: "If the *intention* in executing the deed be to *hinder and delay* creditors, it will vitiate the whole deed, though it be made upon a good consideration, or for the just and equitable purpose of securing

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observes, "(if any there be), is outweighed by their utilty; nor ought we to forget the difference between stated presumptions by statute,* which are express and cautionary rules of conduct, and the presumptions of unwritten law, of which the heads of the learned are the only repositories. If a rule of construction with respect to our transactions with each other is for the public good, it is only necessary that it be clear and ostensible; and no man can reasonably complain of a restriction upon his individual which benefits him in his social capacity, if the terms of that restriction be intelligible, general and certain." Id. 32, 33. The same ground of public policy is taken by Coulter, J., in the case of Mitchell v. Stiles, 18 Penn. St. 306, 309; and see Foote v. Cobb, 18 Ala. 585.

[1] Bowman v. Draughan, 3 Stew. 243; Pulliam v. Newburry, 41 Ala. 168; citing Terrell v. Green, 11 Id. 207, 213; Tatum v. Hunter, 14 Id. 557; Corprew v. Arthur, 15 Id. 525; Huggins v. Perrine, 30 Id. 396; Reves v. Walthal, 38 Id. 329.

[2] 8 Dana, 247, 268. This case is cited, and its doctrine approved by the vice-chancellor of the first circuit, in Van Nest v. Yoe, 1 Sandf. Ch. 4. But the opinion in Vernon v. Morton, above quoted, is qualified in some degree by what immediately follows the extract given in the text: "But to defeat the deed, the fraudulent intent must be *proved;* it is not enough that it may be suspected; and if a good consideration, and an object apparently just, appear in a conveyance, a chancellor should not imply a bad motive upon slight grounds."

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* Lord Mansfield, in 2 Burr. 1072, states the distinction between presumptions grounded upon evidence, and presumptions of law, which are not to be contradicted. The statutory presumption alluded to in the text [Mr. Roberts' text] seems to be a third sort, depending upon an artificial rule of construction.

an equal distribution of the effects among all the creditors."[1] And in the case of Nicholson v. Leavitt,[2] the Court of Appeals of New York adopt the view that an intent to defraud is *implied* in the intent to hinder and delay; the court observing, in answer to the argument, that an intent to hinder and delay creditors, there being no intent to defraud them, will not make an assignment illegal, and that a positive intent to defraud must exist—that "a positive intent to defraud *always does exist* where the inducement to the trust is to hinder and delay creditors, since the right of a creditor to receive his demand when due is as absolute as the right to receive it at all." In this case, the mere intention, in an assignment, of a clause authorizing the assignees to sell the assigned property *on credit*, was held to vitiate the whole instrument, and was viewed by the court as being, "in conscience and in law, a fraud and nothing else."[3] Indeed, there are cases which proceed, professedly, on the ground, not so much of *any actual intent* on the part of the debtor to hinder and delay, as of the *effect of the transfer* itself, to hindering and delaying. In Buck v. Sherman,[4] it was held in Michigan, that "fraud in fact, or an express intent to commit fraud, is not necessary in order to render a conveyance fraudulent as against creditors. It is sufficient if the *effect* of the

[1] So in the case of Keteltas v. Wilson (36 Barb. 298), it was said: "When it appears from the evidence that the intent of the debtor was to delay creditors and effect a settlement, even though the terms of the instrument were in themselves unobjectionable, the assignment will be declared fraudulent." And where the assignor testified in effect that his intent in making the assignment was to accomplish a settlement, and he was corroborated in his evidence by the assignee, this was regarded as conclusive evidence of an intent to hinder and delay creditors, and the assignment was adjudged void. Work v. Ellis, 50 Barb. 512. But see Whedbee v. Stewart (40 Md. 414), where Bartol, C. J., observed: "In dealing with this subject the law does not regard the *motive* of a party unless it be evidenced by some illegal act."

[2] 6 N. Y. 510.

[3] 6 N. Y. 517.

[4] 2 Doug. 176. And see Arthur v. The Commercial and Railroad Bank of Vicksburg, 9 Sm. & M. 394; Cunningham v. Freeborn, 3 Paige, 564; Webb v. Daggett, 2 Barb. S. C. 9. In Leitch v. Hollister (4 N. Y. 211, 214), Gardner, J., speaking of creditors who are excluded from the benefits of an assignment, observes: "They are necessarily hindered and delayed, and *consequently*, in legal contemplation defrauded." And even in England, it has been said in a recent case: "Every deed which has the *effect* of withdrawing property from a creditor, is strictly a deed made with the *intent* to delay, within the second section of the 13 Eliz." Maule, J., in Janes v. Whitbread, 20 Law J. C. P. N. S. 217.

conveyance is to delay or hinder creditors in the collection of their debts." In the later case of Hollister v. Loud,[1] in the same State, it is true a very different doctrine was maintained, it being distinctly held that "if the effect of a conveyance be to hinder, delay or obstruct creditors, it is not therefore void." But in the case of Pierson v. Manning,[2] decided by the same court about the same time, it was held that, "If an assignment by a debtor in failing circumstances is drawn in such a manner as that it must necessarily, in its execution, tend to hinder or delay creditors unprovided for in the collection of their debts, then the legal presumption arising upon the face of the instrument is, that it was so framed with that intent. No other presumption could legally arise upon it. 'The law presumes every man to intend the legal consequences which must naturally flow from his own voluntary acts,'[3] and every man is held responsible accordingly." In Mitchell v. Stiles,[4] in the Supreme Court of Pennsylvania, it was said by Coulter, J., of the conveyance under consideration: "Whatever the private or actual intent of the deed may have been, it wears the marks which, for the benefit of creditors, as a matter of public policy, the law construes into badges of fraud. * * * Its whole scope and effect were to delay, hinder and obstruct creditors. It is therefore void." In Florida, in the case of Gibson v. Love,[5] it was held that where the legal effect of a conveyance is to delay, hinder and defraud creditors, no matter what the

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[1] 2 Mich. 309, cited *ante*, p. 490; Wing, P. J., Id. 316.

[2] 2 Id. 445; Pratt, J., Id. 454.

[3] See this maxim commented on by Comstock and Paige, JJ., in Curtis v. Leavitt, 15 N. Y. 111, 204.

[4] 13 Penn. St. 306, 309. It was further said, in this case, by the learned judge whose remarks are quoted in the text: "I don't perceive any force in the argument that all assignments for the benefit of creditors produce delay and hindrance. And so perhaps they do; but it is delay unavoidably incident to, and resulting from, the execution and performance of such assignments. Delay is incident to all human affairs. We cannot annihilate space and time. But in this and all its kindred cases, the delay is by the will of the grantor, and the hindrance and obstruction to the creditors are stipulated for in the deed. A very different affair indeed. And it is from this circumstance the law infers the intent." Id. 309, 310.

[5] 4 Fla. 217.

actual intention may have been, it is a fraud in law, and the courts are bound so to declare it.

In Maryland,[1] it is held that if the necessary effect of an instrument be to hinder, delay, or defraud creditors, the legal presumption is that it was made for that purpose, and the actual intention of the grantor is not material. And it has been said by an able American writer, in summing up the law on this point, that "an assignment in trust for creditors which by its provisions *tends* to hinder or delay creditors, is fraudulent and void in law."[2]

§ 332. It is clear, however, from the language of the English statute of 13 Elizabeth, that its provisions were directed exclusively against conveyances made with an *actual* INTENT, on the part of debtors, to hinder, delay or defraud creditors, as distinguished from the mere *effect* or *operation* of such conveyances. The expressions in the preamble—"*devised* and *contrived*," "to the end, *purpose*, and *intent* to delay," &c., leave no room for doubt on this point. Hence, it has sometimes been very expressively designated as the "statute against fraudulent *intents* in alienation." It would further appear from the language of the English statute (and the remark seems applicable to its more literal re-enactments in the United States),[3] that the *intent to delay and hinder*, thus contemplated as a ground of avoiding a conveyance, was a *malicious* intent, having some particular, determinate aim to injure creditors—or a *covinous* or guileful intent, carried out by the collusive aid of others, and exhibited in the false show or color given to the transaction itself—or in short, a *fraudulent* intent, in the intenser sense of the term, justifying the description of the transaction as an *offense*.[4] The expressions "devised and contrived of malice,

[1] Schuman v. Peddicord, 50 Md. 560. Similar doctrines prevail in Michigan. Hubbard v. McNaughton, 43 Mich. 220.

[2] Wallace's Note to 1 Am. Lead. Cas. (ed. 1852), 96; citing Sheldon v. Dodge, 5 Den. 217; Bodley v. Goodrich, 7 How. 277; Hart v. McFarland, 13 Penn. St. 185.

[3] The present statutes of New Jersey and North Carolina are of this description.

[4] So it is characterized by Blackstone, distinct from any reference to its penal consequences, and merely as an act to be avoided. 1 Bl. Com. 88.

fraud, covin, collusion or guile," have an obvious reference to the succeeding words "delay" and "hinder," to qualify which they appear to have been purposely introduced; and in that connection, they are appropriate and significant; while, as applied to the word "defraud," which needs no such exposition, they not only lose their significance, but become superfluous.[1] Again, the *penal* character of the statute serves to throw a valuable light upon its meaning and object, in the particular under consideration. The *intent* must have been such as to give a criminal complexion to the transaction, sufficient to subject the offender (as Blackstone terms the party) to the severe penalties of forfeiture of the subject of it, and a half year's close imprisonment. A party would hardly have been held liable to punishment like this, for a mere "intent to delay" a creditor, apart from motives of malice, covin or fraud. Another illustration is presented by the proviso contained in the sixth section—that the statute should not extend to conveyances made "upon good consideration" (that is, for the benefit of actual creditors), "and *bona fide*" (that is, free from all deceptive colors, secret trusts, and collusive practices). This furnishes an auxiliary test, as to cases falling within the statute, which is referred to in the books as frequently as the positive enactment contained in the second section. Thus, in Cadogan v. Kennett,[2] already cited, Lord Mansfield said: "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a *trick and contrivance* to defeat creditors." The same test has been referred to as decisive, by Mr. Justice Story,[3] and Chief Justice Marshall.[4]

§ 333. The views just presented rest, it will be seen, essentially, upon the more literal construction of the English

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[1] This is on the supposition that the manifestly labored phraseology of the statute had some determinate purpose, and was not adopted from a mere fondness for verbosity, with which many of the old statutes, and this, in particular, are sometimes charged.

[2] 2 Cowp. 432, 434.

[3] 2 Story's Eq. Jur. § 353.

[4] United States v. Hooe, 3 Cranch, 73.

statute. A much greater latitude has, however, been sometimes taken in expounding it, in which its supposed general object and policy appear to have been principally regarded.[1] Additional reasons in behalf of the more liberal system of interpretation present themselves, when we come to examine the American statutes, particularly those which have been enacted in a condensed form, on a revision of previous laws. In the process of compression usually adopted in these cases, not only has much matter that was available for purposes of exposition been thrown out, but the whole frame-work of the statute has been changed, and, in some respects, a new statute substituted. Thus, in New York, the statute has no longer a formal preamble, expressly declaring its object to be —"for the avoiding and abolishing of *feigned, covinous,* and *fraudulent* conveyances," "devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors,"—every one of which expressions savors of actual fraud in a strong degree,[2] and points to the source of the intent with great significance; but "*every* conveyance or assignment," &c., "made with the intent to hinder, delay, or defraud creditors," is declared to be void. Again, the penal provisions, to which allusion has been made, as tending, by their close connection with the others, to preserve a stricter system of construction on the part of the courts, have been entirely omitted as a constituent portion of the statute, and transferred to the widely distinct head of criminal law. Lastly, the important proviso by which the statute was expressly declared not to extend to any conveyances made "upon good consideration and *bona fide*," has not been re-enacted; thus depriving the courts of a valuable auxiliary test of the quality of conveyances by debtors, and confining them to the single import of the words, "intent to delay, hinder or defraud," of which so much has already been said. These circumstances seem

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[1] See Rob. on Fraud. Conv. 13–15, 32, 33, 189, 405.

[2] See the opinion of Allen, Senator, in Stewart v. Jackson, 8 Cow. 441.

sufficient to account for, if not to justify, the more liberal system of construction which has come to prevail in the courts of New York, and which, under the former statute, might perhaps have been exposed to the change of undue extension.

§ 334. More might be said, with a view to elucidate from the language of the statute, the nature of the *hindrance* and *delay* of creditors, and of the *intent* to hinder and delay them, contemplated by it; and the words themselves might be subjected to a minuter examination and analysis, in order to ascertain, not only their true individual import, but also the extent to which their mere connection and collocation may have imparted to them; a sense which, individually, they might not have admitted. But, waiving such inquiries, the terms in question will, in what remains to be said under the present head, be considered in a more practical light, and with reference to such actual decisions as may have tended, either directly or indirectly, to define and explain them.

§ 335. The term *delay* has an obvious reference to time, and *hindrance* to the interposition of obstacles in the way of a creditor; but, to a certain extent, the one involves and includes the other. In point of fact, and as actually applied by the courts, they are always taken together. The following are prominent instances in which assignments have been declared void on the ground of hindrance and delay; where the time of sale,[1] or of collection by the assignee,[2] or of finally closing the trust,[3] has been, by the terms of the assignment, unreasonably or indefinitely postponed; where the assignee has been expressly authorized to sell at retail, and on credit,[4] or on credit simply;[5] where the assignment has been made with a view to prevent a sacrifice of the property;[6]

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[1] Hafner v. Irwin, 1 Ired. L. 490.

[2] Storm v. Davenport, 1 Sandf. Ch. 135: see *ante*, p. 308.

[3] Arthur v. Com. R. R. Bank of Vicksburg, 9 Sm. & M. 394; see *ante*, p. 311.

[4] Meacham v. Sternes, 9 Paige, 398, 406, Walworth, C.

[5] Barney v. Griffin, 2 N. Y. 365; Nicholson v. Leavitt, 6 N. Y. 510.

[6] Van Nest v. Yoe, 1 Sandf. Ch. 4; Vernon v. Morton, 8 Dana, 147; but see Cason v. Murray, 15 Mo. 378; see *post*, § 336.

where the proceeds of the assigned property have been directed to be used in defending all suits which might be brought by creditors to recover their debts;[1] and where creditors who should sue have been expressly debarred from the benefit of the assignment,[2] or postponed until all the other creditors are paid.[3] All these were instances of *delaying* and *hindering* creditors in the prosecution of their remedies, in the strict sense of the terms used in the statute.

§ 336. *Intent to Defeat Execution and Prevent Sacrifice of Property.*—A purpose on the part of the assignors in making the assignment, to protect their property from execution and legal process, is consistent with the legalized object of assignments,[4] and there is no legal duty imposed upon debtors to disclose to their creditors their intention of making such a disposition of their property.[5] Nor will a threat to make an assignment furnish evidence of an intended fraudulent disposition of the property.[6] But where the assignors, after judgment had been obtained against them, obtained a stay of execution on the pretense that they had a defense to the action, which, however, they had not, and on the assurance of their attorney that they would not make an assignment, and meanwhile executed an assignment giving preferences, the assignment was held void

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[1] Planck v. Schermerhorn, 3 Barb. Ch. 644; Mead v. Phillips, 1 Sandf. Ch. 83.

[2] Spence v. Bagwell, 6 Gratt. 444; Berry v. Riley, 2 Barb. S. C. 307.

[3] Marsh v. Bennett, 5 McLean, 117.

[4] Jackson v. Cornell, 1 Sandf. Ch. 348; Reed v. McIntyre, 98 U. S. 507; Pike v. Bacon, 21 Me. 281; Place v. Miller, 6 Abb. Pr. N. S. 178; Welles v. March, 30 N. Y. 344; Hauselt v. Vilmar, 2 Abb. N. C. 222; affirmed, 76 N. Y. 630; Hoffman v. Mackall, 5 Ohio St. 124; Baldwin v. Peet, 22 Tex. 708; Stewart v. English, 6 Ind. 176; Hollister v. Loud, 2 Mich. 309; see Heydock v. Stanhope, 40 N. H. 237; and see Bump on Fraud. Conv. p. 358, and the following English cases: Riches v. Evans, 9 C. & P. 640; Johnson v. Osenton, L. R. 4 Ex. 107; Lee v. Green, 35 Eng. L. & Eq. 261; Bowen v. Brainridge, 6 C. & P. 140; Wolverhampton Bank v. Marston, 7 H. & N. 147; Wilt v. Franklin, 1 Binn. 502; Pickstock v. Lyster, 3 M. & S. 373; but see *contra*, Dalton v. Currier, 40 N. H. 237; Livermore v. McNair, 34 N. J. Eq. 478.

[5] Place v. Miller, 6 Abb. Pr. N. S. 178.

[6] Dickerson v. Benham, 12 Abb. Pr. 158; Wilson v. Britton, 6 Id. 97; but see Gasherie v. Apple, 14 Id. 64; Livermore v. Rhodes, 27 How. Pr. 506.

as being made with the intent to hinder and delay the judgment creditors.[1]

§ 337. *Fraud, and Fraudulent Intent.*—Whatever may be said of the effect, under the statute, of a mere *intent to delay or hinder* creditors, apart from any actually fraudulent design on the part of the debtor, there is no doubt that an *intent to defraud*, properly established, will always avoid an assignment. There is no room for discussion of the *quality* of the intent in this case; the expression sufficiently defines itself.

The intent of the assignor, in making the assignment, is the material consideration in determining as to its validity, in cases where it is assailed as fraudulent. And the prevailing rule in New York[2] and in many other States,[3] is that a fraudulent intent, on the part of the debtor alone, is sufficient to avoid the assignment, without proof of any notice of or participation in the fraud on the part of the assignee or creditors, although in other States the rule has been held otherwise.[4]

§ 338. *Fraudulent Intent, how Ascertained.*—One of the most important considerations connected with the sub-

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[1] Jacques v. Greenwood, 12 Abb. Pr. 232; Compare Hauselt v. Vilmar, 2 Abb. N. C. 222; affirmed, 76 N. Y. 630.

[2] In the case of Rathbun v. Platner (18 Barb. 272), it was held that an assignment by a debtor, with the fraudulent intent to hinder, delay and defraud his creditors, is void, although his assignees are free from all imputation of participating in the fraudulent designs, and are themselves *bona fide* creditors of the assignor. See Mathews v. Boultney, 33 Barb. 127; Wilson v. Forsyth, 24 Barb. 105; Griffin v. Marquardt, 17 N. Y. 28; Peck v. Crouse, 46 Barb. 151, 157; Cuyler v. McCartney, 40 N. Y. 221; Work v. Ellis, 50 Barb. 512; Mead v. Phillips, 1 Sandf. Ch. 83; Sands v. Hildreth, 14 Johns. 493; Putnam v. Hubbell, 42 N. Y. 106, 114; Ruhl v. Phillips, 48 Id. 125; rev'g 2 Daly, 45; Jaeger v. Kelly, 52 Id. 274; Dudley v. Danforth, 61 Id. 626; Waterbury v. Sturtevant, 18 Wend. 353.

[3] Ruble v. McDonald, 18 Iowa, 493; Kayser v. Heavenrich, 5 Kans. 324, 340; Hairgrove v. Millington, 8 Id. 480; Gere v. Murray, 6 Minn. 305; Stickney v. Crane, 55 Vt. 89; Lampson v. Arnold, 19 Iowa, 479; Baldwin v. Peet, 22 Tex. 708; Adler v. Ecker, 1 McCrary, 256 (Minn.); Main v. Lynch, 54 Md. 658.

[4] Byrne v. Becker, 42 Mo. 264; State v. Keeler, 49 Mo. 548; Sipe v. Earman, 26 Gratt. 568; Wilson v. Eifler, 7 Cold. 31; Marbury v. Brooks, 7 Wheat. 556; s. c. 11 Wheat. 78; Abercrombie v. Bradford, 16 Ala. 560; Governor v. Campbell, 17 Id. 566; Gates v. Labeaume, 19 Mo. 17; Bancroft v. Blizzard, 13 Ohio, 30; Thomas v. Talmadge, 16 Ohio St. 433.

ject of the present chapter, relates to the *process* or *medium* by which, in judicial investigations of the character of assignments, the fact of fraudulent intent is to be ascertained and made apparent.

In New York, it has been enacted by the Revised Statutes, that the question of *fraudulent intent*, in all cases arising under the statute, shall be deemed a question of *fact*, and not of *law*.[1] This provision was framed with an obvious reference to the well-known appointment of judicial functions between the court and jury, in trials at law; and its principal object was to take from the court the power to infer fraud, or a fraudulent intent,[2] as a conclusion of law, and to transfer it to the jury to ascertain as a matter of fact, from evidence presented in the ordinary way. It has also been said to have been designed to abolish the doctrine of constructive fraud, of which more will be said hereafter. But the provision has not proved operative to the full extent apparently contemplated by it, from the following (among other) considerations. The appropriate tribunals for the investigation of the legal quality of assignments—those, indeed, in which alone they can be directly assailed on the ground of fraud, and with an express view to their overthrow—are courts of equity, which, from the nature of their constitution, do not admit of the participation of a jury in the judicial functions.[3] Hence it was well remarked by Mr. Justice Nelson, in the case of Cunningham v. Freeborn,[4] that "the question of fraudulent intent is undoubtedly made by statute a question of fact, and when before a tribunal in which questions of fact are to be tried by a jury, must be found by the jury. But in a court of equity, these ques-

[1] 2 Rev. Stat. 137; 3 Rev. Stat. (7th ed.) p. 2329, § 4; Livermore v. Northrup, 44 N. Y. 107; Kavanagh v. Beckwith, 44 Barb. 192; Rose v. Meldrum, 11 N. Y. Weekly Dig. 354; Hauselt v. Vilmar, 76 N. Y. 630; affirming 2 Abb. N. C. 222. A similar provision has been enacted in other States.

[2] A distinction has been taken between these terms, and the statute provision held to apply exclusively to the latter. See *post*, § 339.

[3] Assignments by debtors for the benefit of creditors are, in a peculiar sense, the objects of chancery jurisdiction. Jones v. Dougherty, 10 Ga. 273.

[4] 11 Wend. 240, 251.

tions may be, and usually are, determined by the court; and it necessarily follows that there the fraudulent intent must thus be found." [1]

Hence, it is comparatively seldom, and usually not in the most important cases, that juries are called on to pass upon the question of fraudulent intent, as a question appertaining to their peculiar functions. And even within this limited sphere of application, the courts have given to the statute a construction which tends to narrow it still further, by holding that in cases where the question has actually been submitted to a jury, as belonging to them to determine, if the verdict found by them be not warranted by the facts and law of the case, the court will set it aside.[2] And in Goodrich v. Downs,[3] it was decided by the Supreme Court, that though the question whether an assignment is void on the ground of its having been made with *intent* to defraud creditors, is for the jury, yet, where the assignment shows on its face a fact which is, *per se*, evidence of fraud—as that it was made in trust for the use of the assignor, either in whole or in part—the court is bound to pronounce the transaction void, without submitting the question to the jury.

In Illinois,[4] it seems that the question whether an assignment was made to hinder, delay and defraud creditors, is one of fact for the jury, or the court sitting as a jury, to determine.

§ 339. *Fraud in Law and in Fact.*—This brings us to consider more particularly the nature of fraud, with reference to the two leading divisions so often mentioned in the books, —fraud in *law*, and fraud in *fact*. "Fraud," said Mr. Justice Buller, in Estwick v. Caillaud,[5] "is sometimes a ques-

[1] But in Baldwin v. Peet (22 Tex. 708), it was said: "A court of equity, having the right to find the facts from the evidence, might well infer from those established and patent facts the additional and important facts of fraudulent intent, and having thus found it, declare the legal consequence by setting aside the deed as void, just the same as though the fraudulent intent were confessed in the petition. This power of a court of equity, of finding one material fact which is not admitted by inference and deduction from those that are admitted, does not pertain to our courts in causes involving principles of equity any more than those involving questions of law as contradistinguished from equity."

[2] Vance v. Phillips, 6 Hill, 433; see Cunningham v. Freeborn, 11 Wend. 240.

[3] 6 Hill, 438. [4] Nimmo v. Kuykendall, 85 Ill. 476. [5] 5 Term R. 420.

tion of law, sometimes a question of fact, and sometimes a mixed question of law and fact. If we are to decide on the face of the deed itself, that is a question of fraud in point of law." Perhaps it would be more accurate to say that fraud is never purely a question of law, nor exclusively a question of fact;[1] though it may frequently partake more largely of the one quality than of the other.

In the State of New York, there have been conflicting opinions in regard to which of the two divisions just mentioned the question of fraud properly belonged; and in some of them the propriety and even the existence of the distinction itself has been denied. In the earlier cases in the Supreme Court, the inclination was to bring the question within the province of the court, by declaring it to be, in many instances, a question of law. "Fraud," it was said by Kent, C. J., in Sturtevant v. Ballard,[2] "is a question of law; and especially where there is no dispute about the fact. *It is the judgment of law on facts and intents*, as has been frequently observed by judges of the greatest eminence." The same opinion was repeated by Woodworth, J., in Jackson v. Mather.[3] But in Seward v. Jackson,[4] in the Court of Errors, very different views were held. "Strictly speaking," it was said, "there is no such thing as fraud in law; fraud or no fraud is, and even must be, a *fact;* the evidence of it may be so strong as to be conclusive; but still it is evidence, and as such must be submitted to a jury. No court can draw it against the finding of a jury." It was the delivery of the opinions in this case, and in the previous one of Verplanck v. Sterry,[5] which, as recently stated by a learned judge, himself one of the revisers of the statutes,[6] led to the enactment of the provision already mentioned, making the question of fraudulent intent in all cases a question of fact. That those cases were considered to have abolished the dis-

[1] Foster v. Woodfin, 11 Ired. L. 339.
[2] 9 Johns. 342.
[3] 7 Cow. 301, 304.
[4] 8 Id. 406, 485. See Jackson v. Peek, 4 Wend. 300.
[5] 12 Johns. 536.
[6] Duer, J., in Nicholson v. Leavitt, 4 Sandf. S. C. 287.

tinction between fraud in law and fraud in fact, appears from the emphatic language used by the Supreme Court in Jackson v. Timmerman.[1] "There is," said the court (Sutherland, J.), "no such thing as fraud in law, as distinguished from fraud in fact. What was formerly considered as fraud in law, or *conclusive* evidence of fraud, and to be so pronounced by the court, is now but *prima facie* evidence to be submitted to and passed upon by the jury." But another and different exposition of the statute was afterwards given by the chancellor, in Cunningham v. Freeborn;[2] a distinction being drawn between *fraud* and *fraudulent intent*. "The Revised Statutes," it was said, "have not made the *fraud itself* a question of *fact*, neither, indeed, was it possible for the legislature to do so. For when a party has intentionally executed an assignment or conveyance of his property, which *must* hinder and defraud his creditors of their just demands, the question whether the conveyance is fraudulent or not necessarily becomes a question of *law*, and not of fact. The object of the statute was to reach a particular class of cases, where the conveyance would not *necessarily* have the effect to defraud creditors or others of their rights, and where the question of fraud must, of course, depend upon the *intent* with which the conveyance was executed. In all such cases, the question of *fraudulent intent* is declared to be a question of fact and not of law." Similar views were held by the Supreme Court in Goodrich v. Downs,[3] already cited.

And in the case of Dunham v. Waterman,[4] Mr. Justice Selden, referring to the opinion of the Court of Errors in Cunningham v. Freeborn,[5] remarked: "It follows from the reasoning of Mr. Justice Nelson, which I regard as unanswerable, that whenever an assignment contains provisions which are calculated *per se* to hinder, delay, or de-

[1] 7 Wend. 436, 438.

[2] 3 Paige, 557, 564. And see remarks of Nelson, J., s. c. 11 Wend. 240, 251.

[3] 6 Hill, 438. And see Webb v. Daggett, 2 Barb. S. C. 9.

[4] 17 N. Y. 9.

[5] 11 Wend. 240, 251.

fraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding if in opposition to the plain inference to be drawn from the face of the instruments. A party must in all cases be held to have intended that which is the necessary consequence of his acts."[1]

It has been thought that the latter cases in this State revive the doctrine of *constructive fraud*,[2] which the provision of the Revised Statutes before quoted is said to have been expressly intended to abolish; and taking the term in the sense usually given to it by writers of authority, it would appear that such has been the actual result. "By constructive frauds," observes Mr. Justice Story, "are meant such acts or contracts as, although not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their *tendency* to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as within the same reason and mischief as acts and contracts done *malo animo*."[3] In another passage the learned commentator remarks as follows: "Another class of constructive frauds upon the rights, interests, or duties of third persons, embraces all those agreements and other acts of parties which *operate*, directly or virtually, *to delay*, *defraud*, or deceive *creditors*. Of course we do not here speak of cases of express and intentional fraud upon creditors, but of such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly

[1] See remarks of Ingraham, J., in Wakeman v. Dalley, 44 Barb. 508. Mr. Justice Atwater (Gere v. Murray, 6 Minn. 305), referring to the New York cases, makes the following observations: "We gather as a result of their investigations (the N. Y. courts), that the question of fraudulent intent is a mixed question of law and fact—that is, that the existence of a certain intent is a question of fact for the jury (when not disclosed by the papers), and for the court to declare whether such intent be fraudulent or otherwise."

[2] Duer, J., in Nicholson v. Leavitt, 4 Sandf. S. C. 287.

[3] 1 Story's Eq. Jur. § 358.

undermining their interest. It is difficult in many cases of this sort to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature, which the law pronounces fraudulent upon principles of public policy. Indeed, they are often found mixed up in the same transaction," &c.[1] It will be seen that it is upon these very grounds of *tendency* and *operation*, and *legal policy*, as distinguished from actual evil design or intentional fraud, that assignments have been declared void in several of the cases which have already been reviewed or referred to.[2]

§ 340. *Fraud, how established.*—It is a settled rule of law that fraud is never to be presumed,[3] but must always be

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[1] 1 Story Eq. Jur. § 849. "A constructive fraud," says a learned judge, speaking of the doctrine as abolished, "was necessarily a question of law. It was a fraud that the judges, in construing the provisions of a conveyance or assignment, presumed to exist, not only without evidence that it was intended by the parties, but even in cases where no such intention could have existed, as where a voluntary conveyance by a solvent grantor was held to be fraudulent against subsequent creditors or purchasers." Duer, J., in Nicholson v. Leavitt, 4 Sandf. S. C. 287.

[2] In Florida, where the distinction between fraud in law and fraud in fact is established, it is held to be the duty of a judge to instruct the jury that their conclusions from facts must be regulated by the character and import given to those facts by necessary legal implication. Some acts are proof of fraudulent intent, and it is the duty of the court so to instruct the jury. Gibson v. Love, 4 Fla. 217; see also the observations of Pearson, J., in Jessup v. Johnson, 3 Jones' Law, 335. In California, where the question of fraudulent intent is in all cases a question of fact, it is nevertheless held that wherever the law declares that certain *indicia* are conclusive evidence of fraud, a verdict against such conclusive evidence should in all cases be set aside. On the other hand, where the evidence of fraudulent intent is declared by the law to be only presumptive, the jury have the power, upon considering the whole case, to find against such presumption. Billings v. Billings, 2 Cal. 109, 113, 114; and see the observations of Pratt, J., in Pierson v. Manning, 2 Mich. 445, 455, 456; see Henry v. Root, 33 Id. 378.

In Missouri, the rule is thus laid down by Mr. Justice Scott (Johnson v. McAllister's Assignee, 30 Mo. 327): "We have never adopted, in this State, the course of decisions in New York under the statute concerning fraudulent conveyances. Our courts do not hear extrinsic evidence in relation to the validity of a conveyance, and then, on such evidence, as a matter of law, pronounce the conveyance void. When a conveyance, on its face, is fraudulent and void, the court will declare it so. But when it appears to be fair, and its validity depends on extrinsic evidence, that evidence is submitted to a jury, who will determine as a matter of fact whether it is fraudulent or not."

In New Mexico, it is held that under the common law procedure it is the duty of the court to determine whether an assignment is fraudulent in law or not; and an assignment fraudulent in law, though not fraudulent in fact, is ground for an attachment. Leitensdorfer v. Webb, 1 N. Mex. 34.

[3] Sutherland, J., in Grover v. Wakemann, 11 Wend. 187, 192; Hempstead v. Johnson, 18 Ark. 123; Thornton v. Hook, 36 Cal. 223; Foster v. Brown, 65 Ind. 234; Bump on Fraud. Convey. p. 559, and cases cited; Roberts on Fraud. Convey. 528.

proved;[1] that is, it is not to be presumed in the absence of evidence.[2] The presumption of law is always against bad faith.[3] So in equity, fraud is not to be presumed.[4] The burden of fraud rests upon the party making the charge, and it must be clearly established.[5] Hence the rule of practice in equity, that where an assignment is not fraudulent on its face, a mere charge in a bill that it was made to defraud creditors, as the complainant is informed and believes, not verified by the oath of any person having personal knowledge of the alleged fraud, is not sufficient to entitle the plaintiff to an injunction against the assignees.[6]

In construing the provisions of a general assignment the same rules are to be applied as in the case of other conveyances. There is the same presumption in favor of good faith with respect to them as in the case of ordinary contracts and conveyances. They will be supported rather than be declared void, and therefore, where the language of the assignment can be abundantly satisfied by a construction which will support the instrument, such construction should be given.[7]

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[1] Vernon v. Morton, 8 Dana, 247; Grover v. Grover, 3 Md. Ch. Dec. 29; Parkhurst v. McGraw, 24 Miss. 134; Henckley v. Hendrickson, 5 McLean, 170; Wilson v. Lott, 5 Fla. 305; 1 Story's Eq. Jur. § 190; Blow v. Gage, 44 Ill. 208; Bartlett v. Blake, 37 Me. 124; Belk v. Massey, 11 Rich. 614; Waddingham v. Loker, 44 Mo. 132; Roberts v. Guernsey, 3 Grant (Penn.), 237.

[2] Kellogg v. Slauson, 13 Barb. 56, 58; see Brigham v. Tillinghast, Id. 618. It is sometimes said that fraud must be proved, and is never to be presumed. This proposition can be admitted only in a qualified and very limited sense. Allegations of fraud are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption. Black, C. J., in Kaine v. Weigley, 22 Penn. St. 179; Reed v. Noxon, 48 Ill. 323.

[3] Brown v. Bartee, 10 Sm. & M. 268–274; Garland, J., in United States v. Bank of the United States, 8 Rob. (La.) 403. In Palmer v. Mason (42 Mich. 146), it is said: "A transfer for the benefit of creditors, or by way of security, will not be adjudged fraudulent, as a conclusion of law drawn from the frame of the instrument, unless that construction is a necessary result in view of its peculiar shape and scope."

[4] Bogert v. Haight, 9 Paige, 297; Walworth, C., Id. 302; Parkhurst v. McGraw, 24 Miss. 134; Hollister v. Loud, 2 Mich. 309, 324, 325; 1 Story's Eq. Jur. § 190; but see Rob. Fraud. Conv. 328.

[5] Dunham v. Gates, 2 Barb. Ch. 196; Washington v. Ryan, 5 Baxter (Tenn.), 622; Dodd v. Hills, 21 Kans. 707; Buck v. Sherman, 2 Doug. (Mich.) 176; Hollister v. Loud, *ubi supra;* Blow v. Gage, 44 Ill. 208; Nye v. Van Husan, 6 Mich. 329; Olney v. Tanner, 10 Fed. Reptr. 101; Brahmstadt v. McWhirter, 9 Neb. 6.

[6] Bogert v. Haight, 9 Paige, 297.

[7] Townsend v. Stearns, 32 N. Y. 209; Benedict v. Huntington, Id. 219; Sherman v. Elder, 24 Id. 381; Grover v. Wakeman, 11 Wend. 187; Shultz v. Hoagland, 85 N. Y. 464; Coyne v. Weaver, 84 Id. 386, and cases cited.

§ 341. But though fraud cannot be presumed in the absence of evidence, it may always be *presumed*, that is, *inferred from circumstances* shown in evidence. And it is by this indirect or presumptive method that it is, in fact, usually made out and *proved*—what is called direct or positive proof of fraud being rarely attainable.[1] Hence it is well settled that fraud or fraudulent intent may be proved by circumstances.[2] In regard to the character or strength of the evidence in such cases, it is a further rule that fraud will not be presumed from slight circumstances, or circumstances of an equivocal tendency,[3] or circumstances of mere suspicion, leading to no certain results.[4] But circumstances affording a strong presumption will be deemed sufficient evidence.[5] It has been said that the proof should be so clear and conclusive as to leave no rational doubt upon the mind.[6] Fraud will not be presumed where the facts out of which it is supposed to arise may well consist with honesty and pure intention.[7]

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[1] Kaine v. Weigley, 22 Penn. St. 179; see Bump on Fraud. Conv. p. 560.

[2] Henckley v. Hendrickson, 5 McLean, 170; Anderson v. Tydings, 3 Md. Ch. Dec. 167; Pine v. Rikert, 21 Barb. 469; Parkhurst v. McGraw, 24 Miss. 134; Wright v. Linn, 16 Tex. 42; McDaniel v. Baca, 2 Cal. 326. In Brinks v. Heise (84 Penn. St. 246), it was held that where it is alleged that an assignment was made to defraud creditors, it is competent to prove any fact tending to show the relations and conduct of the parties thereto. The alleged fraud must be established either by direct proof or by facts to warrant a presumption of its existence; and the fact that an assignment was made for the purpose of hindering and defrauding creditors, avoids it as against contesting creditors.

[3] Wing, P. J., in Hollister v. Loud, 2 Mich. 309, 324, 325, and cases cited ibid.

[4] Fisher, J., in Parkhurst v. McGraw, 24 Miss. 134, 136, 137; 1 Story's Eq. Jur. § 190.

[5] Fisher, J., in Parkhurst v. McGraw, *ubi supra;* McDaniel v. Baca, 2 Cal. 326.

[6] Wing, P. J., in Hollister v. Loud, *ubi supra;* citing Buck v. Sherman, 2 Doug. (Mich.) 176. But in Watkins v. Wallace (19 Mich. 57), where the judge charged the jury that "fraud will not be presumed from slight circumstances, the *proof must be clear and conclusive*," it was held that this language was likely to lead the jury to suppose that they must disregard all balancing of evidence and require a case absolutely free from doubt, and was therefore objectionable. See Bump on Fraud. Conv. pp. 560 *et seq.*

[7] Chilton, J., in Smith v. Mobile Bank, 21 Ala. 126, 135; Work v. Ellis, 50 Barb. 512. It is said by Mr. Justice Story, that neither courts of equity nor courts of law insist upon positive and express proof of fraud, "but each deduces them from circumstances affording strong presumptions. But courts of equity will act upon circumstances, as presumptions of fraud, where courts of law would

In a late case[1] in New York, it was held that where an assignment is attacked for fraud, the fraud must be proved and not presumed; that while it can seldom be directly proved, and usually is a deduction from other facts, which naturally and logically indicate its existence, yet such facts must be of a character to warrant the inference.

"It is not enough that they are ambiguous and just as consistent with innocence as with guilt. That would substitute suspicion as the equivalent of proof. They must not be, when taken together and aggregated, when interlinked and put in proper relation to each other, consistent with an honest intent. If they are, the proof of fraud is wanting."

§ 342. The grounds upon which fraud is established against assignments must be considered under a twofold division: first, with reference to their *origin*, as appearing on the face of the deed of assignment itself, or by matter extrinsic, or from both in conjunction; and secondly, with reference to their *quality*, as constituting, *per se*, evidence of fraud, or as only tending to establish such a conclusion, and admitting of explanation. The first of these divisions is susceptible (as just indicated) of a threefold subdivision, which has been very fully and clearly stated by a learned judge in an important case,[2] in the following terms: A conveyance made by an insolvent debtor, may be fraudulent on its face, containing provisions which the law deems necessarily, and under all circumstances, fraudulent in their operation; or it may be void as against creditors, solely by reason of matter *dehors* the deed, from a want of consideration, or of good faith; or it may have the effect to defeat or delay creditors by reason of some provision in the deed,

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not deem them satisfactory proofs. In other words, courts of equity will grant relief upon the ground of fraud established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law." 1 Story's Eq. Jur. § 190.

[1] Shultz v. Hoagland, 85 N. Y. 464.

[2] Curtis, J., in Stewart v. Spencer, 1 Curt. 157, 159. To declare a conveyance fraudulent *per se*, the vice must be apparent on the face of the instrument. Hill v. Agnew, 12 Fed. Reptr. 230.

operating in connection with particular states of fact shown to exist out of the deed, though the same provision in a deed, not connected with such other extraneous facts, would not hinder or delay creditors, and so would not render the deed invalid."

§ 343. *Fraud on the Face of the Deed.*—Assignments are constantly declared void as being fraudulent *on their face*, where they contain provisions in direct conflict with some established rule or requisite of law, the most important instances of which are the following: where they are made in trust for the use of the assignor, in whole or in part [1]—where they contain some provision for his benefit or the benefit of his family, at the expense of the creditors; [2] as by stipulating for a gross [3] or annual sum; [4] or reserving a surplus of moneys or property to the assignor, after providing for only a portion of the creditors; [5] or stipulating for the possession of the property assigned; [6] or imposing coercive terms upon creditors; [7] or reserving a power of interfering with and controlling the application of the assigned property or its proceeds, as by declaring new preferences; [8] or reserving a power of revocation in any form; [9] or reciting that the assets are far greater than the liabilities, and clothing the assignee with great discretionary power; [10] or finally, where they contain

[1] Mackie v. Cairns, 5 Cow. 547; Goodrich v. Downs, 6 Hill, 438; Leitch v. Hollister, 4 N. Y. 211; Ziegler v. Maddox, 26 Md. 575; Bigelow v. Stringer, 40 Mo. 195, where the cases are collected; see Gardner v. Commercial Nat. Bank, Index N. (R. I.) 88.

[2] Gazzam v. Poyntz, 4 Ala. 374; Henderson v. Downing, 24 Miss. 106; see Holmes v. Marshall, 78 N. Ca. 262; Gardner v. Commercial Nat. Bank, 95 Ill. 298.

[3] Harris v. Sumner, 2 Pick. 129.

[4] Mackie v. Cairns, 5 Cow. 547.

[5] Goodrich v. Downs, 6 Hill, 438; Barney v. Griffin, 2 N. Y. 365.

[6] Brooks v. Wimer, 20 Mo. 503; Stanley v. Bunce, 27 Mo. 269; Read v. Pelletier, 28 Id. 173; Billingsley's Adm'r v. Bunce, 28 Id. 547; see Cheatham v. Hawkins, 76 N. Ca. 335; Joseph v. Levi, 58 Miss. 843; Harman v. Hoskins, 56 Id. 142.

[7] Grover v. Wakeman, 11 Wend. 187; Marsh v. Bennett, 5 McLean, 117.

[8] Sheldon v. Dodge, 4 Den. 217; Gazzam v. Poyntz, 4 Ala. 374; Price v. Pitzer, 44 Md. 521.

[9] Cannon v. Peebles, 4 Ired. L. 204.

[10] First Nat. Bank v. Hughes, 10 Mo. App. 7.

any provision expressly intended to hinder, delay or defraud creditors, of which sufficient has already been said.

The insertion of a provision to pay individual debts out of partnership property in an assignment of the partnership effects of an insolvent firm, is conclusive evidence of a fraudulent intent on the part of the assignor.[1]

Where the fraud thus appears on the face of the deed, the courts usually assume to pass upon it, without the intervention of a jury, it being of that character already described as *fraud in law*. When the court can see that a deed is fraudulent on its face, it has been said, there is nothing for a jury to pass upon. If the law imputes to the grantor a design in making the deed, no evidence of intention can change the presumption; if the law declares such deeds to be void, it is no matter how the question of fraud in fact may stand.[2] Where it is apparent from the deed itself that the object and intent of its execution was to hinder, delay and defraud creditors, the court has but the one duty to perform—that is, to declare it null and void.[3] So, where it appears on the face of the assignment that it was not absolute and unconditional, and that it contains by legal implication a resulting trust, the legal construction of the instrument is for the court and not the jury. The law when applied to the case settles

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[1] Wilson v. Robertson, 21 N. Y. 587; Schiele v. Healy, 61 How. Pr. 73; Platt v. Hunter, 11 N. Y. Weekly Dig. 300.

[2] Green v. Trieber, 8 Md. 11; Inloes v. Am. Ex. Bank, 11 Id. 173; Rosenburg v. Moore, 11 Id. 376; Malcolm v. Hodges, 8 Id. 418; Schuman v. Peddicord, 50 Id. 560; Farrow v. Hayes, 51 Id. 498; Jones v. Syer, 52 Id. 211; Bigelow v. Stringer, 40 Mo. 195; State v. Benoist, 37 Id. 500.

In Hubbard v. McNaughton, 43 Mich. 220, it is said: "The fraudulent character of an assignment cannot depend upon the opinions of the assignors that what they do is not fraudulent. If they withhold from the assignment what should be put into it, and if they make gifts or excessive liens on property, which should not be incumbered or given away, it is a fraud, and their belief that it is not will not save it from the consequences of fraud."

[3] Dargan, C. J., in Johnson v. Thweatt, 18 Ala. 741, 744. The New York cases hold that where an assignment on its face shows that it must necessarily have the effect of defrauding the creditors of the assignor, it is conclusive evidence of fraudulent intent, and it is void. Kavanagh v. Beckwith, 44 Barb. 92; see Shelden v. Dodge, 4 Den. 217; Goodrich v. Downs, 6 Hill, 438; Wakeman v. Dalley, 44 Barb. 498, 503; affirmed, 51 N. Y. 27; Griffin v. Marquardt, 21 N. Y. 121; Cunningham v. Freeborn, 11 Wend. 240; Sturtevant v. Ballard, 9 Johns. 337; Forbes v. Waller, 25 N. Y. 430.

the question of its validity at once, and nothing remains to be submitted to the jury.[1]

Moreover, an assignment which is void or fraudulent on its face cannot be cured by the operation of the assignment laws.[2]

The process employed in these adjudications upon the face of the deed is one of inference or presumption;[3] but it is of the strict kind called "legal or artificial presumption,"[4] founded for the most part on views of general expediency or policy. Without allowing any inquiry into the actual intent of the debtor, the law makes the deed itself as evidence, and from that alone *infers the intent;* it *presumes* such intent to have been fraudulent: it "imputes" to the debtor an unlawful design in making the deed; it "construes" the terms of the deed into "badges of fraud," and condemns it accordingly.[5] This presumption is sometimes founded on a single provision in the deed, occasionally on a very few words,[6] but more commonly on various provisions taken together.[7]

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[1] Pratt, J., in Pierson v. Manning, 2 Mich. 445, 456; and see the observations of Chilton, C. J., in Shackelford v. P. & M. Bank of Mobile, 22 Ala. 238, 248; and of Pearson, J., in Jessup v. Johnston, 3 Jones' Law, 335, 338; Billings v. Billings, 2 Cal. 107; Jenness v. Doe, 9 Ind. 461; Kavanagh v. Beckwith, 44 Barb. 193; Henry v. Root, 38 Mich. 373.

[2] Keevil v. Donaldson, 20 Kans. 165.

[3] Jessup v. Johnston, *ubi supra.*

[4] Roberts on Fraud. Conv. p. 32; Bump. on Fraud. Conv. p. 70.

[5] Green v. Trieber, 8 Md. 11; Mitchell v. Stiles, 18 Penn. St. 306, 309; Pierson v. Manning, 2 Mich. 445, 456; Oliver Lee & Co. Bank v. Talcott, 19 N. Y. 146.

[6] In Nicholson v. Leavitt (6 N. Y. 510), the decision declaring the assignment void was founded upon the three words—"or upon credit." In Bingham v. Tillinghast (18 N. Y. 215), a similar decision was founded on the three words—"or available means."

[7] In giving a legal construction to the assignment, "it becomes necessary for the court to examine every part and provision contained in it, and to apply thereto the law of the case." Pratt, J., in Pierson v. Manning, 2 Mich. 456. The following remarks of Dargan, C. J., in Johnson v. Thweatt (18 Ala. 741, 747), may be inserted here: "I do not intend to lay down any fixed rule, and say that a particular provision or feature in a deed shall in all cases be deemed conclusive evidence of fraud, where the deed is not a general assignment for the benefit of creditors, but is intended as a security for particular debts, or to protect particular individuals. All I intend to say is this: that, if from the whole deed, the intent to defraud, hinder and delay the creditors of the grantor is manifest, if the mind can come by a course of reasonable argument to no other conclusion, the court is bound to pronounce the deed fraudulent and void."

§ 344. *Fraud, from Matter Extrinsic.*—Again, fraud, when not apparent on the face of the deed, may be shown by evidence of extrinsic circumstances, such as bad faith, or collusion between the parties,[1] &c. The question in such cases is one of fact for the jury; and the fraud is inferred from the circumstances proved, in the ordinary mode of presumption from facts.

It is a fraud to intentionally withhold from a general assignment property which ought to have been included in it.[2]

§ 345. *Fraud, from both Sources.*—Finally, fraud may be established from the terms of the assignment *in connection with* evidence of extrinsic facts.[3] "It is often a question of intrinsic difficulty to determine, from the terms of the deed itself, whether it is conclusively fraudulent, or whether its provisions, though somewhat suspicious, may not be consistent with good faith. If the provisions of the deed be of the latter character, and the court cannot clearly see, by an examination of it, the intent to defraud creditors, it may submit the question of intent to the jury, who will take into consideration not only such suspicious provisions, but also the evidence that may be offered to explain them, as well as that to fix the fraudulent intent on the deed."[4] "Where the presumption of fraud, as arising upon the face of the deed, cannot be conclusively drawn, from the dubious nature of the provision on which it is attempted to predicate it, it becomes a disputable presumption, one capable of being explained and repelled by proof. In such case, the deed should not be declared void upon its face and excluded from the jury, but it may be read to them; and it is for them,

[1] Thus, in Farrington v. Sexton (43 Mich. 454), it was held that fraud is fairly inferable from the fact that the goods were inventoried at $55,011.68 and were appraised at $27,272.77, while the goods on hand five weeks before inventoried about $95,000; it may also be inferred from a showing that the assets of a certain company belonged to the assigning firm and had been disposed of by collusion.

[2] Farrington v. Sexton, 43 Mich. 454; Hubbard v. McNaughton, Id. 220.

[3] The case of Stewart v. Spencer (1 Curt. 157, 159), was decided upon evidence of this character.

[4] Dargan, C. J., in Johnson v. Thweatt, 18 Ala. 741, 744.

under the direction of the court, to determine, upon the effect of the whole proof, whether a fraudulent intent did in fact exist."[1]

§ 346. *Indicia or Badges of Fraud.*—The expression "badges of fraud," is sometimes used to distinguish the lighter grounds on which fraud may be established, from such as are apparent on the face of the assignment, and necessarily involve its invalidity.[2] But it is also used in a larger sense, as including all the grounds on which assignments may be adjudged fraudulent.[3] The distinctive character of these "badges" (or "marks," as they are otherwise termed), in their more limited import, is that they may always be explained, and their effect may be thus avoided.[4]

They may appear on the face of the assignment itself, or from extrinsic evidence. The assignment is said "to wear" them,[5] where it contains provisions tending to produce an impression of fraud against the debtor, or to excite suspicion of a fraudulent design. The insertion of unusual clauses,[6] and the absence of the ordinary and proper appendages of the instrument, such as schedules,[7] belong to this class. Among the more common badges of fraud, of an extrinsic character, are—the appointment of objectionable persons as assignees[8]—the assignment of more property than is sufficient to pay the debts[9]—and the retention of possession

[1] Chilton, C. J., in Shackelford v. P. & M. Bank of Mobile, 22 Ala. 238, 248. And where the court charged the jury thus: "It is for the jury to determine from the facts and circumstances developed by the testimony in this cause, as well as from the general character, terms and provisions of the deed of assignment itself, whether the intention of the parties was fair and *bona fide* at the time of making the same, or whether it was fraudulent"—considering the character of the deed and the facts in proof, the charge was said to have presented the true issue to the jury. Green v. Banks, 24 Tex. 508.

[2] See Bump on Fraud. Conv. c. 4, "Badges of Fraud;" Cunningham v. Freeborn, 11 Wend. 240; Williams v. Jones, 2 Ala. 314.

[3] Garland, J., in United States v. Bank of the United States, 8 Rob. (La.) 403; Coulter, J., in Mitchell v. Stiles, 13 Penn. St. 306, 309.

[4] Cunningham v. Freeborn, 11 Wend. 240.

[5] Coulter, J., in Mitchell v. Stiles, 13 Penn. St. 306, 309.

[6] Twyne's Case, 3 Co. 80.

[7] Wilt v. Franklin, 1 Binn. 502; see *ante*, pp. 195, 201.

[8] See *ante*, pp. 131, 132.

[9] See *ante*, p. 141.

of the property after it has been assigned.[1] The secrecy of the transfer,[2] and its being made on the eve of judgments,[3] also fall under this division, as well as the power to sell on credit.[4]

These badges, marks or *indicia* of fraud, are distinguished as *light* or *strong*, according to their weight in producing an impression unfavorable to the validity of the assignment. In most instances, they are made up of several circumstances, which are taken and weighed together, in judging of their effect; and it is their connection and united tendency which usually gives them force. A circumstance which, of itself, would be of trifling importance, acquires strength as a badge of fraud, from its combination with others.

§ 347. *The Statute of* 3 *Henry VII, c.* 4, *and its Re-enactments.*—In addition to the statute of 13 Elizabeth, c. 5, and its re-enactments in the United States, which have just been considered, there is another class of statute provisions by which the courts are governed in pronouncing upon the character of assignments, as being fraudulent and void against creditors. These may be termed by way of distinction, "statutes against conveyances in trust for the use of the person making them." Most of these are re-enactments of the English statute of 3 Henry VII, c. 4, passed A. D. 1487, by which, after reciting that "oftentimes deeds of gift of goods and chattels have been made with intent to defraud creditors of their duties, and that the person or persons that maketh the said deed of gift goeth to sanctuary or other places privileged, and occupieth and liveth with the said goods and chattels, their creditors being unpaid," it was enacted:

"That all deeds of gift of goods and chattels, made or

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[1] See *ante*, p. 390, and *post*, Chap. XXX.

[2] Twyne's Case, 3 Co. 80; Hafner v. Irwin, 1 Ired. L. 490.

[3] Williams v. Jones, 2 Ala. 314. This is not now usually regarded as an important circumstance against an assignment. See *ante*, p. 508.

[4] Eicks v. Copeland, 58 Tex. 581.

to be made, of trust to the use of that person or persons that made the same deed of gift, be void and of none effect." [1]

This provision was re-enacted in New York, by the act of February 26th, 1787, in the following words:

"All deeds of gift and conveyances of goods and chattels, made or to be made in trust to the use of the person or persons making the same deed of gift or conveyance, shall be and hereby are declared to be, void and of none effect." [2]

In the Revised Statutes of 1830, the same provision was again enacted in the following words:

"All deeds of gift, all conveyances, and all transfers or assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." [3]

The same or a similar provision has been enacted in the States of New Jersey,[4] Indiana,[5] Michigan,[6] Wisconsin,[7] Oregon,[8] Missouri,[9] Alabama,[10] Minnesota,[11] and Kansas.[12]

It will be seen that the provisions of this statute, and its re-enactments, are expressly confined to transfers of *personal* property—"goods and chattels," or "goods, chattels and

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[1] 2 Statutes at Large, 370. The principle of this provision may be traced to an earlier period. By the statute of 50 Edw. III, c. 6, after a recital similar to that of the 3 Henry VII, but applying to the tenements as well as chattels, it was ordained "that if it be found that such gifts be so made by collusion, that the said creditors shall have execution of the said tenements and chattels, as if such gifts had not been made." 1 Statutes at Large, 332; Crabb's His. Eng. Law, 274; Angell on Assignments, 3. This statute extended only to the case of persons who eluded execution by flying to privileged places; but it seems that when they remained exposed to execution, such sale or assignment was not fraudulent within the statute. Id. ibid.; Dyer, 295, a, b; Co. Litt. 76 a.

[2] 1 Rev. Laws (1813), p. 75, § 1.

[3] 3 Rev. Stat. (7th ed.), p. 2337; 2 R. S. 135, § 1.

[4] Rev. Stat. (ed. 1878), p. 446, § 11.

[5] 1 Stats. of Ind. (1876), p. 506, § 18.

[6] 2 Comp. Laws (ed. 1872), p. 1456 (4697), § 1.

[7] 2 Stats. of Wis. (Taylor, 1871), p. 1255; R. S. (1878), p. 654, § 2306.

[8] Gen. Laws (1874), p. 522, § 45.

[9] 1 Stats. of Mo. (Wagner), p. 279; R. S. (1879), § 2496.

[10] Code of Ala. (ed. 1867), p. 411, § 1861.

[11] 1 Stats. at Large (Biss.), p. 690; Stat. of Minn. (1878), p. 543, § 14.

[12] Gen. Stats. of Kans. (1868), p. 504; Comp. L. (1881), p. 464.

things in action." Hence it was designated, in a case in the New York Court of Appeals, as "the *personal* statute of uses," and "the statute of *personal* uses."[1]

It will be further seen that, although the preamble of the English statute contains the expression, "intent to defraud," which is so prominent in the statute of 13 Elizabeth, yet the enacting part is absolute and unqualified, declaring the conveyances void, whatever the intent may have been. The enactments in the United States, which are without any preamble or recital, are equally broad and absolute in their terms.

§ 348. The principle of this provision of the statute of 3 Henry VII, was the same with that of the subsequent statute of 27 Henry VIII, c. 10 (usually known as "the statute of uses"), the doctrine established being the very equitable one, that where a debtor created a trust in personal property for his own exclusive use or benefit, he was to be deemed and treated as the owner, and the property might be taken by his creditors, for the payment of their debts, in the same manner as if the conveyance had not been made. The conveyance, in other words, was a fraud upon creditors and therefore void. The construction given to the statute of Henry VII, has also always been the same with that given to the statute of uses, namely, that a simple and merely formal trust of personal property, unaccompanied by any power whatever on the part of the trustee, except to hold the title for the grantor, was void; and the whole legal title, or, what was the same thing, the legal possession, was in the grantor *cestui que trust.*

On comparing the provisions of these two statutes—of 13 Elizabeth and 3 Henry VII—and their re-enactments in the United States, it will be found that, while the former deals with the *intents* of grantors, and admits of every reference to extrinsic facts which can show the character of such intents, the latter raises the question for the courts, in every case, on the face of the deed, unembarrassed by any consid-

[1] Comstock, J., in Curtis v. Leavitt, 15 N. Y. 119, 122; Brown, J., Id. 147, 149.

erations of intent, and free from all reference to extrinsic facts;[1] and has been well said to "furnish a simple, unvarying rule of decision."[2] The questions thus raised, being purely questions of law, fall within the exclusive province of the court to determine; the fraud sought to be established belonging, in every case, to the division already described as *fraud in law*, or fraud *per se*.[3]

§ 349. On a further comparison of these two statutes and their re-enactments, particularly as they form a part of the statute law of the State of New York, another distinction becomes apparent, namely: that while the provisions of the "statute against fraudulent conveyances" are found constantly referred to and relied on by the courts, throughout the long series of adjudications upon assignments to be found in the reports—those of the "statute against conveyances in trust for the use of the grantor," have been referred to and followed in comparatively a very few cases. Indeed, it was said in the case of Curtis v. Leavitt,[4] that prior to the case of Goodrich v. Downs, of which more will be said presently, the last-named statute had not been referred to in this

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[1] Comstock, J., in Curtis v. Leavitt, 15 N. Y. 119, 120.

[2] Id. 119.

[3] If a conveyance, on the face of it, appears to be for the use of the person making it, the court will, as a matter of law, declare it void as against creditors; just as it would declare a bond conditioned to do any unlawful act. Robinson v. Robards, 15 Mo. 459. It was said by a learned judge, in delivering his opinion in an important case, that "the statute of personal uses," as it was termed, "is not, in any proper sense, a statute against frauds, although fraudulent practices may have led to its enactment;" and that, "the simple inquiry is, whether the property belongs to the debtor, not upon a theory of fraud and against the terms of the conveyance, but upon a theory of equitable title reserved to himself by the very conveyance which transfers the legal and nominal title to another." Comstock, J., in Curtis v. Leavitt, 15 N. Y. 122. But, with deference, it may be observed that the expression "intent to defraud" in the preamble of the statute of Henry VII, sufficiently indicates the character of the original provision; while the titles given to most of the modern re-enactments, declare them to be provisions *against fraud*, in so many words. The New York act of 1787, in which the provision was first embodied, is entitled "An act for the prevention of frauds;" and in the Revised Statutes the same provision, as amended, is placed under the head of "Fraudulent conveyances and contracts, relative to goods, chattels, and things in action."

[4] 15 N. Y. 117, Comstock, J.; Id. 147, Brown, J.

State in more than a single case.[1] The reason of this omission will perhaps appear in the sequel.

In the case of Goodrich v. Downs,[2] however (which was decided by the Supreme Court in 1844), the statute against conveyances of personal property in trust for the use of the grantor, was prominently referred to, and in fact, distinctly relied upon, as decisive authority for declaring an assignment by a debtor in failing circumstances, void; the court (Bronson, J.) holding that where an assignment shows on its face that it was made in trust for the use of the assignor, either in whole, *or in part*, it is *void in law*, and the court is bound to declare it so, without submitting the question to the jury. It was further held that a provision in an assignment for the return to the assignor of any surplus proceeds of the property assigned, after paying certain of the assignor's creditors, without providing for the rest, was a trust for the use of the assignor, and that it made no difference that the trust so declared was, or would be, in point of fact, of no benefit to the assignor, as where it could be shown that the property assigned would not sell for enough to pay the creditors provided for.[3]

Although this may have been the first case in this State in which the statute in question was expressly relied on as a principal ground of the decision, the doctrine advanced is in accordance with the views expressed in previous cases cited by the court,[4] and has been sustained in later decisions.[5]

From all these cases it will appear that the language of this statute against conveyances in trust for the use of the grantor, like that of the statute against fraudulent convey-

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[1] Mackie v. Cairns, 5 Cow. 380. A similar omission of reference to this statute in the English cases, was noticed by Comstock, J., *ubi supra*.

[2] 6 Hill, 438.

[3] This case, so far as it may be understood to have turned upon the statute, has been overruled. See Curtis v. Leavitt, and referred to in text, *post*, p. 524; see Comstock, J., in Collomb v. Caldwell, 16 N. Y. 485.

[4] Mackie v. Cairns, 5 Cow. 547; Grover v. Wakeman, 11 Wend. 187.

[5] Barney v. Griffin, 2 N. Y. 365; Leitch v. Hollister, 4 Id. 211.

ances, has been very liberally construed by the courts. The statute of 3 Hen. VII, c. 4, as may be gathered from its preamble, seems to have been directed against those palpably fraudulent descriptions of transfer by which a debtor, intending to defraud his creditors, placed his property entirely beyond their reach, by conveying it in trust for his own *exclusive* use. But the decisions in question have extended the modern enactments to cases of transfer professedly, and indeed actually, for the *benefit of creditors*, and so far unobjectionable or commendable, but *containing a trust* in favor of the assignor, or a reservation to him on a certain contingency, even although such trust or reservation turns out to be of no real benefit to the assignor, the transfer proving to be *entirely* for the benefit of *creditors*.

§ 350. In the very important case of Curtis v. Leavitt,[1] in the Court of Appeals of the State of New York, an effort was made to extend the construction of this statute still further. In this case, a trust and banking company,[2] having become greatly embarrassed in its affairs, and being in danger of insolvency, had adopted the plan of issuing bonds, first for a million, and then for half a million of dollars, which were intended to be sold in England, in order to raise money for the uses of the company. To secure the payment of these bonds, the company executed two deeds of trust, by which it assigned to trustees a large amount of bonds and mortgages. By the terms of the deeds, the trustees covenanted to hold the assigned property in trust for the company, until default should be made in the payment of the trust bonds, and after such default to hold it in trust for the bondholders. After payment of all the bonds, and the expenses of the trusts, the deed provided that the trustees should hold the assigned property in trust for the company, and should transfer and dispose of the same as the company

[1] 15 N. Y. 9; see 17 Barb. 309.

[2] The North American Trust and Banking Company, organized under the general banking act of the State, with a capital of two millions of dollars.

should direct. Among other grounds upon which these deeds were assailed, they were claimed to be void as to creditors, on account of the trusts or reservations just mentioned; and the statute against conveyances in trust for the use of the grantor, as expounded and applied in Goodrich v. Downs, was prominently relied on. But the court held that the statute applied only to conveyances, &c., *wholly or primarily* for the use of the grantor,[1] and not to conveyances for other and active purposes, where the reservations are incidental and partial only; and the case of Goodrich v. Downs, so far as it maintains the contrary, was overruled.[2] The court attached great importance to the fact that throughout the numerous cases which had arisen in this State prior to the last-mentioned case, involving the validity of instruments conveying a debtor's property in trust, with some use or advantage reserved to himself (and in most of which the instruments were set aside), and throughout the many able opinions which had been pronounced, the statute relied on had been mentioned only once.[3] The court further held that if the statute could be considered applicable to transfers made for other objects, but containing a residuary interest or partial use for the debtor, it avoided only so much of the grant as was not sustained by the valid purposes for which it was made, and that it did not avoid the entire instrument which contained the invalid use.[4]

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[1] The language of Comstock, J., is: "This statute, then, only avoids conveyances, &c., which are wholly to the use of the grantor." 15 N. Y. 123.

[2] Comstock, J., Id. 114–124; Brown, J., Id. 147–149. The court understood the case of Goodrich v. Downs as declaring the following principles: "First. That every conveyance of personal estate, for whatever object, if it contains any reservation of use or benefit to the grantor, is within the statute against conveyances in trust for the use of the person making the same. Second. Being thus void in part, the whole is void. Third. The intent of the part making the conveyance, however meritorious, has nothing to do with the question." Comstock, J., Id. 115. The court were of opinion that these propositions, if not individually unsound, were certainly so in their aggregate result and influence upon instruments of the class to which they were applied in the case cited. Id. 116.

[3] Comstock, J., Id. 117; Brown, J., Id. 147.

[4] Comstock, J., Id. 123, 124. This case is understood as overruling Goodrich v. Downs, *supra*; see Collomb v. Caldwell, 16 N. Y. 484.

In the case of Rome Exch. Bank v. Eames, 4 Abb. Ct. App. Dec. 83, 95, which

§ 351. *How Assignments are Considered.*—In determining whether an assignment is or is not fraudulent against creditors, the question is said to be, not whether fraud may be committed by the assignee, but whether the provisions of the instrument are such that, when carried out according to their apparent and reasonable intent, they will be fraudulent in their operation.[1]

Another rule is, that the character of the assignment will not be affected by subsequent events; and if valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it.[2]

An assignment cannot be defeated by proof that the as-

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was a case of conveyance in trust to pay debts, and then in trust for the support of the grantor, Mr. Justice Wright summarized the construction of this provision in the following words: First, the conveyance was of both real and personal estate, and the former is not within or condemned by the statute. The trust as to the real estate, which constituted the bulk of the transfer, was unquestionably valid. Second, the statute only avoids conveyances, &c., of personal estate, which are wholly to the use of the grantor. Third, if it were held to apply to transfers made for other objects but containing a residuary interest or partial use for the debtor, the whole grant would not be void, but only so much of it as is not sustained by the valid purpose for which it was made. The meaning of this statute (sometimes called the statute of personal uses), was fully considered in Curtis v. Leavitt, 15 N. Y. 9. It was there held that it applies only to conveyances, &c., wholly or primarily for the use of the grantor, and not to instruments for other or active purposes, where the reservations are incidental and partial only; that if it can be applied to instruments executed for real and active purposes, such as to secure debts or procure money on loans, it avoids only so much of the grant as is not sustained by the valid purpose for which it was made. It does not avoid the entire instrument which contains the invalid use. And see remarks of Robertson, J., in Powers v. Graydon, 10 Bosw. 646; and remarks of the same learned judge in Scott v. Guthrie, 10 Bosw. 420; s. c. 25 How. Pr. 512.

In Wilson v. Robertson (21 N. Y. 587), where partnership property was assigned to pay certain creditors of one of the partners jointly with the partnership creditors, the court seems to place the right to object wholly upon the statutory provision.

In Spies v. Boyd (1 E. D. Smith, 445, 448), Mr. Justice Daly seems to have entertained a different view of the proper construction of this provision. This was previous to the decision in Barney v. Griffin, 15 N. Y. 9; and see McLean v. Britton, 19 Barb. 450.

[1] Ward v. Tingley, 4 Sandf. Ch. 476; Brigham v. Tillinghast, 15 Barb. 618; Bank of Silver Creek v. Talcott, 22 Id. 552; Forbes v. Scannell, 13 Cal. 242.

[2] Browning v. Hart, 6 Barb. S. C. 91; Klapp's Assignees v. Shirk, 13 Penn. St. 589; Wilson v. Berg, 88 Id. 167; Shattuck v. Freeman, 1 Metc. 10; see McGuire v. Faber, 25 Penn. St. 436; Governor v. Campbell, 17 Ala. 566; Gates v. Labeaume, 19 Mo. 17; Pierce v. Jackson, 2 R. I. 35.

In Hardman v. Bowen (39 N. Y. 200) it is said: "If the assignment was valid in creation, having been honestly and properly executed and delivered, no subsequent illegal acts either of omission or commission can in any manner invalidate it." But it is said in Shultz v. Hoagland (85 N. Y. 464), that this rule must be

signees abused their trust, misappropriated the property, or acted however dishonestly in its disposal.[1] This is on the principle that where a conveyance is not fraudulent at the time of the making of it, it shall never be said to be fraudulent for any matter *ex post facto*.[2] But the immediate conduct of the assignee in taking, or professing to take possession, and the acts and declarations of the parties at or about the time of the transfer, are admissible as part of the *res gestæ*.[3] And where the evidence shows that the assignor and assignee are combined in a conspiracy to defraud the creditors, the acts and declarations of either conspirator, while carrying the common intent into execution and in furtherance thereof, become admissible.[4]

But the declarations of the assignor or his acts subsequent to the conveyance are mere hearsay, and do not bind the grantee in the absence of such proof of conspiracy.[5] But this

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taken as not intended to deny that such subsequent acts may reflect light back upon the original intent and help us to ascertain that correctly.

In Talcott v. Rosenthal (22 Hun, 573) it is held that a preferential assignment cannot be treated as a fraudulent disposition of the debtor's property, merely because, shortly before its execution, he purchased goods upon a credit which had not expired at the time of the assignment, for which goods he had no reasonable hope of being able to pay.

[1] Cuyler v. McCartney, 40 N. Y. 221; Meeker v. Saunders, 6 Iowa, 61; Savery v. Spaulding, 8 Iowa, 239; Beck v. Parker, 65 Penn. St. 262; Guerin v. Hunt, 6 Minn. 375; Hotop v. Durant, 6 Abb. Pr. 371, note; Hempstead v. Johnston, 18 Ark. 123; Mathews v. Poultney, 33 Barb. 127; Cox v. Platt, 32 Barb. 126; Eicks v. Copeland, 53 Tex. 581; see Leeds v. Commonwealth, 83 Penn. St. 453.

In Olney v. Tanner (10 Fed. Reptr. 101) it is held that where an assignment is complete and perfect in itself, and not fraudulent in its inception, it is not invalidated by the subsequent remissness or inefficiency of the assignee.

[2] Shep. Touchst. 67, cited Beck v. Parker, 65 Penn. St. 262. The validity of assignment cannot be made to depend on the assignee's subsequent testimony as to whether he would have taken it or not if he had known that the assignor had conveyed a tract of land the day before he made the assignment. Coots v. Chamberlain, 39 Mich. 565.

[3] Cuyler v. McCartney, 40 N. Y. 221; Smith v. Mitchell, 12 Mich. 180; Flanigan v. Lampman, 12 Id. 58; Bates v. Ableman, 13 Wis. 644; see Covert v. Rogers, 38 Mich. 363.

[4] Cuyler v. McCartney, 40 N. Y. 221. In Main v. Lynch (54 Md. 658), evidence had been given to show the assignee's knowledge of the assignor's fraudulent purposes and of participation in fraudulent acts *before* the assignment. It was held that his acts afterwards were admissible in evidence on the question of fraud; that if the jury found there was a conspiracy then the acts of the assignee were the acts of the assignor.

[5] Howard v. Snelling, 32 Ga. 195; Bullis v. Montgomery, 50 N. Y. 352; Coyne v. Weaver, 84 Id. 386; Dunkee v. Chambers, 57 Mo. 575; Norton v. Kearney, 10

rule is said to be subject to the exception that the acts and declarations of the grantor while he remains in possession of the assigned property, are competent evidence against the grantee, for they are then a part of the *res gestæ*.[1]

An assignment, if good when made, cannot be affected by an act of the legislature afterward passed, on the ground that it was then known to the assignor that such act was about being passed.[2] Nor will a previous fraud always invalidate an assignment, or render it liable to be set aside as fraudulent.[3] On the other hand, an assignment, if fraudulent and void when executed and delivered, will not be rendered operative and valid by any subsequent act of the assignor.[4]

§ 352. *Extent to which Assignments may be Avoided.*— "It is a general, though not a universal rule," observes Chancellor Tucker, "that a deed cannot, even in equity, be good in part and void in part; and that if void because fraudulent as to any part of it, it is void in the whole. There is no question that if a deed be fraudulent *in fact*, it is absolutely void *in toto*, and it is not permitted to stand as a security for what is really due, or for any purpose of reimbursement or indemnity. For deeds made of purpose to defraud creditors or purchasers are, by the law itself, declared void; they are therefore void at law as well as in equity, and it is not in

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Wis. 443; Bates v. Ableman, 18 Id. 644; Savery v. Spaulding, 8 Iowa, 239; Frankel v. Coots, 41 Mich. 75; and see Wykoff v. Carr, 8 Mich. 44; Hargrove v. Millington, 8 Kans. 180; Baldwin v. Buckland, 11 Mich. 389.

[1] Bump on Fraud. Conv. p. 549; see Adams v. Davidson, 10 N. Y. 309; see this case commented on in Cuyler v. McCartney, 40 N. Y. 221. In an action by the assignee against the sheriff, it was held that if the assignor was permitted to retain possession of the property assigned his statements made in the assignee's absence were admissible. Frankel v. Coots, 41 Mich. 75.

[2] Dana v. Bank of the United States, 5 W. & S. 223.

[3] Reinhard v. Bank of Kentucky, 6 B. M. 252; Cooke v. Smith, 3 Sandf. Ch. 332. In Wilson v. Berg (88 Penn. St. 167), it is said: "If, prior to the assignment, the assignor had fraudulently conveyed or concealed any of his property, such acts would not impair the validity of a general assignment subsequently made. If the conveyed or concealed property can be recovered by the assignee, it should be for the benefit of the creditors. If he cannot recover it, then any creditor may pursue it in like manner as if the general assignment had not been made."

[4] Averill v. Loucks, 6 Barb. S. C. 470; Bridges v. Woods, 16 Md. 101; see Chap. XVII.

the nature of a deed to be, *at law*, good as to part and void as to the residue. But where the deed is only constructively fraudulent, it is otherwise."[1]

The principle that where an assignment is fraudulent as to any of its provisions, it is void *in toto* as against creditors who are entitled by law to take advantage of the fraud, has received the sanction of the courts in several important cases,[2] and has been said to be too well established to need any reference to authorities to support it.[3]

In New York, it was held by the chancellor, in Wakeman v. Grover,[4] that an assignment which is void in part, on the ground of being against the provisions of a statute, is void *in toto*, and no interest passes thereby to the assignee as against the creditors who did not assent to it.[5] And in

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[1] 2 Tucker's Com. [443] 432.

[2] Pierson v. Manning, 2 Mich. 446, 460; Caldwell v. Williams, 1 Ind. 405, 411; Burke v. Murphy, 27 Miss. 167; Redfield, C. J., in Mussey v. Noyes, 26 Vt. 462, 472; 1 Am. Lead. Cas. 73, 74, citing Mackie v. Cairns, 5 Cow. 549, 580; Goodrich v. Downs, 6 Hill, 438, 440; Fiedler v. Day, 2 Sandf. S. C. 594, 597; Harris v. Sumner, 2 Pick. 129, 137; McClung v. Lecky, 3 Penr. & W. 83, 94; Irwin v. Keen, 3 Wheat. 347, 355; Halsey v. Whitney, 4 Mason, 207, 230; Ticknor v. Wiswall, 9 Ala. 305, 311; Kissam v. Edmonston, 1 Ired. Eq. 180, 184; Hafner v. Irwin, 1 Ired. L. 490, 498.

[3] Pratt, J., in Pierson v. Manning, 2 Mich. 460; Perkins, J., in Caldwell v. Williams, 1 Ind. 411; Redfield, C. J., in Mussey v. Noyes, 26 Vt. 472.

[4] 4 Paige, 23, 24, 37 (citing Hyslop v. Clarke, 14 Johns. 458; Austin v. Bell, 20 Id. 442); affirmed on appeal, Grover v. Wakeman, 11 Wend. 187. Redfield, C. J., in Mussey v. Noyes (26 Vt. 462, 472), refers to Wakeman v. Grover, and also to Ames v. Blunt, (5 Paige 13), and Platt v. Adams, (7 Id. 615), as directly in point to show that assignments, where, in some points, they contravene the express provisions of a statute, must be regarded as wholly void.

[5] Mr. Justice Scates, in Howell v. Edgar (4 Ill. 417, 419), in commenting upon this distinction, observes: "'The statute,' says Lord Herbert, 'is like a tyrant; when he comes he makes all void; but the common law is like a nursing father, and makes void only that part where the fault is, and preserves the rest. 1 Mod. 35. But the common law doth divide according to common reason, and having made that void which is against law, lets the rest stand as it is.' 14 Hen. VIII, fol. 15; Hob. 14; 9 Pet. 679. On the other hand, in Tennor's Case (Coke, 76), it is said: 'The common law doth so abhor fraud and covin that all acts, as well judicial as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful.' Montagu, C. J., lays down the same doctrine very strongly. 'Covin,' says he, 'may be where the title is good, and the title shall not give benefit to him that has it by reason of the covin, for the mixture of the good and evil together makes the whole bad; the truth is obscured by falsehood, and the virtue drowned in the vice.' Plowd. 54. The court in the case of Hyslop v. Clarke (14 Johns. 464), seems to think that the better opinion is, that at the common law a deed fraudulent in part is altogether void. I think the better reason is found in the former opinion in making void only so much as is contrary to law."

the later cases of Rogers v. De Forest,[1] and Barnum v. Hempstead,[2] it was decided that whenever the legal effect of any provision of the assignment is to defraud the creditors of the assignor, the whole assignment is void. And that where an assignment in trust to sell for the benefit of creditors is coupled with other express trusts not authorized by law, the conveyance is inoperative, and will not transfer the title in the assigned property to the trustees. In Goodridge v. Downs,[3] it was held by the Supreme Court, that if any part of an assignment be contrary to the statute for the protection of creditors against fraudulent transfers, the whole is void; and that one illegal trust will vitiate all the rest. But in Darling v. Rogers,[4] the chancellor's decision in Rogers v. De Forest was reversed, without dissent, by the Court of Errors, and a very important qualification of the general rule was established. It was held that an assignment may be void or invalid in part, and yet be valid and operative in its general effect, even when what is void or inoperative is declared so by *statute*, unless the statute declares the *whole* deed to be void.[5] Accordingly it was decided, that an assignment in trust to sell or mortgage real estate was valid as to the trust to *sell*, though void as to the trust to mortgage. The ground taken, on a critical examination of the statute, was that, as the trust to sell would be confessedly valid if it stood alone, it could not be defeated or destroyed by the mere addition of the unauthorized trust to mortgage.[6] The opinion of Senator Verplanck in this case contains some valuable illustrations on the point in question, which are here subjoined: "There can never be any difficulty in applying this construction of the statute, where the two trusts are wholly separate, though in the same instrument: as where

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[1] 7 Paige, 272.
[2] 7 Paige, 568.
[3] 6 Hill, 438.
[4] 22 Wend. 483.
[5] Opinion of Cowen, J., Id. 490. So in Alabama, it has been held that a deed may be void in part, not only at the common law but by statute, and stand good for the residue. Anderson v. Hooks, 9 Ala. 704.
[6] Opinions of Cowen, J., 22 Wend. 487, 490; and of Verplanck, S., Id. 493, 494.

part of the land is conveyed to one purpose, that being a valid one, and part to another and an invalid one; or where the whole is assigned first for a valid trust, and that failing, to some void purpose. But when the purposes are in the *alternative*, or when they are mixed and complicated together, the separation of the good and the bad may not be obvious, and sometimes not possible. When the void part is so complicated with a trust otherwise valid as to form an essential part of the intent and object of the person creating it, it may vitiate the whole, because the trust may be in fact single, though composed of several parts, one of which is void. Thus, in a trust to 'receive and pay over rents,' the object is mainly the paying over to the beneficiary, and if that is prohibited by law the whole subsidiary trust fails. But as to other separate or alternative dispositions, the doctrine established as to devises affords a safe and accurate rule. This is, in substance, that when a will is good in part and bad in part, the part otherwise valid is void if it works such a distribution of the estate as, from the whole testament taken together, was evidently never the design of the testator. Otherwise, when the good part is so far independent that it would have stood, had the testator been aware of the invalidity of the rest.[1] * * * Nor is this confined to *devises;* the prevailing doctrine of equity (and in many cases of our common and statute law also) is, that when good and bad provisions are mixed in a deed, the good shall be saved, so far as consistent with probable intent."[2] Similar views were taken by the court in the case of Curtis v. Leavitt,"[3] already referred to. In this case, the rule of

[1] The learned senator here refers to the case of Coster v. Lorillard (14 Wend. 265), in the Court of Errors, and Hawley v. James (5 Paige, 318), in the Court of Chancery. See also the case of Salmon v. Stuyvesant, 16 Wend. 321; Root v. Stuyvesant, 18 Id. 257; Parks v. Parks, 9 Paige, 106, 117.

[2] Darling v. Rogers, 22 Wend. 494, 495.

[3] 15 N. Y. 9. A distinction appears to be taken in the New York cases between conveyances rendered void by fraud and trusts which are prohibited as being liable to abuse or contrary to public policy. Thus, as we have seen *ante*, p. 525, note 4, it has been held that under the "statute of personal uses," only so much of the trusts that is obnoxious to the statute fails; and the cases cited in the text lay down a similar principle as to an invalid trust to mortgage coupled with a valid trust to sell.

"void in part, void *in toto*," was particularly considered, and its application to the case in question explicitly disclaimed. The court say: "There is no such general principle as the maxim would seem to indicate. On the contrary, the general rule is, that if the good be mixed with the bad, it shall nevertheless stand, provided a separation can be made. The exceptions are: First, where a statute, by its express terms, declares the whole deed or contract void on account of some provision which is unlawful; and, Second, where there is some all-pervading vice, such as fraud, for example, which is condemned by the common law, and avoids all parts of the transaction because all are alike affected." [1]

The rule that an assignment cannot be void in part and valid in part, is subject to the following further exceptions.

§ 353. An assignment of different kinds of *property* in trust, may be valid in respect to some portions of the property, and invalid as to others. Thus, it may be valid as to personal property, though held void as to real.[2]

An assignment may be valid as to certain *debts*, though invalid as to others. Thus in Virginia, a deed of trust executed in part to secure fraudulent debts, but in part to secure a *bona fide* debt, the *bona fide* creditor having no notice of the dishonest purpose on the part of the grantor, was held to be a valid security for the *bona fide* debt.[3] So, in North Carolina, it has been held that although one of the debts inserted in a deed of trust to secure several creditors,

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[1] Comstock, J., Id. 96, 97; see also Id. 123, 124. The learned judge cites Doe v. Pitcher (6 Taunt. 363); Collins v. Blantern (2 Wils. 348); Pigott's Cases (11 Coke, 27); Darling v. Rogers (22 Wend. 483); Patterson v. Jenks (2 Pet. 235); Norton v. Simmes (Hob. 12 c.); Mackie v. Cairns (5 Cow. 564, per Sutherland, J.); Nichols v. McEwen (17 N. Y. 22); Jessup v. Hulse (21 N. Y. 168); Campbell v. Woodworth (24 N. Y. 304). "The court cannot undertake to unravel the meshes of fraud, or to sustain an instrument concocted in fraud, although some of the provisions may be meritorious or harmless." Dunkin, C., in Henderson v. Haddon, 12 Rich. Eq. 407.

[2] Rogers v. De Forest, 7 Paige, 272; Forbes v. Scannell, 13 Cal. 242; see Rome Ex. Bank v. Eames, 4 Abb. Ct. App. Dec. 88; or *vice versa*, Hoopes v. Knell, 31 Md. 550.

[3] Billups v. Sears, 5 Gratt. 31.

be fraudulent, yet the legal title passes to the trustee, and his sale to a third person is valid.[1] And in Alabama, where a deed of trust to secure a debt really and *bona fide* due, provides that after it is satisfied, a simulated debt professedly owing to another person shall be paid from the proceeds of the same property, the deed is not void as to the real creditor, if he did not participate in the fraud of the grantor.[2]

In Tennessee,[3] an intentional fraud by the maker of a trust deed as to a portion of the debts provided for, but not participated in by the other beneficiaries whose deeds are valid, avoids the deed only as to so much as is embraced by the fraudulent purpose of the maker, and concurred in by the beneficiaries whose debts are false and fictitious. Such a deed is good as to the claims of other beneficiaries.

But in a case in New York, it was held that an assignment, if fraudulent, in respect of a principal preferred debt, is void *in toto*, although another preferred debt, and the unpreferred debts provided for, be all due in good faith.[4]

An assignment may be void as to certain *parties*, and valid as to others.[5] Thus, it may be void as to creditors on the ground of not being recorded, and at the same time valid as against a subsequent voluntary assignee.[6] So, in case of an assignment directly to creditors, it may be void as to one assignee, and valid as to another. Thus, where a debtor assigns property to two persons by one instrument, "to hold to them respectively in the proportions which the debts due to them respectively bear to each other," and the assignment is fraudulent and void as to one of the assign-

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[1] Harris v. De Graffenreid, 11 Ired. L. 89.

[2] Anderson v. Hooks, 9 Ala. 704.

[3] Troustine v. Lask, 4 Baxter, 162.

[4] Fiedler v. Day, 2 Sandf. S. C. 594; see *ante*, p. 158, n. 4. But it is held in Maryland, that the fact that some of the preferred debts are fraudulent does not avoid the assignment; it is still good as to *bona fide* debts. A creditor taking under the assignment is not precluded from showing fraud and collusion as to debts which stand in his way or prejudice him by being paid. Mackintosh v. Corner, 33 Md. 598; see Reiff v. Eshleman, 52 Id. 582.

[5] As to who may vacate assignment, see *post*, Chap. XLIV.

[6] Seal v. Duffy, 4 Penn. St. 274.

ees, it is nevertheless valid as to the other, if innocent of the fraud.[1]

So an assignment, though voidable against such creditors as think proper to disaffirm it, is valid in favor of such as choose to affirm it, and to insist upon their rights as against the assignee.[2] An assignment confessedly fraudulent is good as to creditors who assent to it.[3]

§ 354. Finally, an assignment, though void as against creditors, is always valid as between the immediate parties.[4] This qualification is implied in the words of the statutes of fraudulent conveyances themselves; the conveyance being declared void "only as against those persons who are delayed, hindered or defrauded" by it.[5] The assignor is estopped by his own deed,[6] and the assignee, as to those creditors who choose to insist upon their rights against him, is estopped from denying the validity of the assignment, ex-

[1] Prince v. Shepard, 9 Pick. 176. So in Ohio, an assignment which might be void under the statute relating to bank commissioners was held not to be void as to creditors, unless the commissioners vacate it. Rossman v. McFarland, 9 Ohio St. 369.

[2] Ames v. Blunt, 5 Paige, 13; Mills v. Argall, 6 Id. 577; Bradford v. Tappan, 11 Pick. 76.

[3] Hone v. Henriques, 13 Wend. 240; Bodley v. Goodrich, 7 How. 277; see Geisse v. Beall, 8 Wis. 367; White v. Banks, 21 Ala. 705. A creditor's right to complain of a fraudulent assignment may be lost by waiver or acquiescence, and he may let it alone if he chooses. Blake v. Hubbard, 45 Mich. 1.

[4] Ames v. Blunt, 5 Paige, 13; Mills v. Argall, 6 Id. 577; Jackson v. Cadwell, 1 Cow. 622; Smith v. Howard, 20 How. Pr. 121; Bradford v. Tappan, 11 Pick. 76; Norris v. Norris' Adm'r, 9 Dana, 318; Dearman v. Radcliffe, 5 Ala. 192; Van Winkle v. McKee, 7 Mo. 435; Bigelow v. Baldwin, 1 Gray, 245; Whitney v. Freeland, 26 Miss. 481; Bellamy v. Bellamy's Adm'r, 6 Fla. 62; Epperson v. Young, 8 Tex. 135. It is valid, also, as against the representatives and heirs of the parties. Id. ibid.; Cushwa v. Cushwa, 5 Md. 44; see Laney v. Laney, 2 Ind. 642; George v. Williamson, 26 Mo. 190; see Bump on Fraud. Conv. p. 448. The conveyance, though void as to creditors, is good against the grantor and his representatives. Storm v. Davenport, 1 Sandf. Ch. 135; Mackie v. Cairns, 5 Cow. 547; Morrison v. Brand, 5 Daly, 40; Ogden v. Prentice, 33 Barb. 160; Waterbury v. Westervelt, 9 N. Y. 605; Osborne v. Moss, 7 Johns. 161; Jackson v. Cadwell, 1 Cow. 622. Equity will give no relief to the fraudulent grantor against the grantee by directing an accounting and reconveyance. Sweet v. Tinslar, 52 Barb. 271; Stewart v. Ackley, Id. 283. In Rumery v. McCulloch (54 Wis. 565), an assignment, inoperative as against creditors from a defect in the justification of the sureties on the assignee's bond, was held valid, as between the parties thereto, to pass the property to the assignee.

[5] See the statute, *ante*, p. 479.

[6] Dearman v. Radcliffe, 5 Ala. 192; Schuman v. Peddicord, 50 Md. 560; see Richardson v. Rogers, 45 Mich. 591.

cept so far as it has been impeached or disaffirmed by other creditors; and he must account for the assigned property accordingly, although he has surrendered up the assignment and taken a new one upon different trusts.[1]

The execution of a deed good *inter partes*, which is subsequently impeached by creditors, does not disable the grantor from making a second valid deed of the same property to the same grantees.[2]

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[1] Mills v. Argall, 6 Paige, 577; see Bellamy v. Bellamy's Adm'r, 6 Fla. 62.

[2] First Nat. Bank v. Hughes, 10 Mo. App. 7; Rumery v. McCulloch, 54 Wis. 565. In a case in Rhode Island, it was held that earlier assignments being good as against all persons except dissenting creditors, later assignments could only affect property acquired after the earlier assignment, or thereafter becoming attachable or accruing to the assignors as surplus. Gardner v. Commercial Nat. Bank, R. I. Index N, 88.

CHAPTER XXVI.

ASSIGNMENTS CONSIDERED IN CONNECTION WITH OTHER TRANSFERS BY THE ASSIGNOR.

An important point of view in which assignments may be considered, is their *connection with other transfers* made by the debtor, of previous, subsequent, or contemporary date; and the extent to which they are affected by, or themselves affect such transfers.

§ 355. *Assignments in Connection with Mortgages.*— An assignment will sometimes be rendered void by its connection with mortgages executed by the assignor to certain creditors, and giving them preferences to others. Thus, in Massachusetts, where an insolvent debtor, while the statute of 1836 was in force, gave instructions, at the same time, for drawing a mortgage of a part of his property to secure the payment of certain creditors in full, and a general assignment of all his property, subject to the mortgage, in trust, to be distributed ratably among all his creditors who should become parties to the assignment, pursuant to the statute; and the mortgagees were also the trustees under the assignment; and the mortgage was executed by the debtors, and accepted by one of the mortgagees, before the execution of the assignment, but the assignment was executed before the mortgage was accepted by the other mortgagees; and the assignment contained an express release of the demands of the creditors by whom it should be signed—it was held that the mortgage and assignment were to be construed *together as one instrument*, and as the mortgage gave a preference to certain creditors, the mortgage and the assignment both were void as against attaching creditors.[1] But where, on

[1] Perry v. Holden, 22 Pick. 269.

the same day, and nearly at the same time with making an assignment under the statute, debtors gave certain mortgages to certain creditors, by which preferences were given to such creditors—it was held that the fact that a debtor had thus given preferences by anterior acts, though it might subject him to disabilities, did not render the assignment void, whatever effect it might have upon the security thus given, if the creditor knew of the debtor's intention.[1] The distinction taken in this last case was that the mortgages were distinct acts, not constituting one transaction with the assignment, as in the previous case; there being no privity and no communication between the mortgagees and the assignee, and it not appearing that the mortgagees knew of the intent of the debtors to make an assignment.[2] In a later case in the same State, there were mortgages executed in connection with an assignment, under the following circumstances. A debtor, on being called upon by A., one of his creditors, to give security, promised to do so by a mortgage of his personal property. He thereupon directed his attorney to prepare, 1, a mortgage of his personal property, to secure B., another of his creditors; 2, a mortgage of the same property, subject to the first mortgage, to secure A.; 3, a general assignment of all his property to B. under the statute of 1836, c. 238, subject to the two mortgages. The mortgages and assignment were all executed and delivered on the same evening, in the order in which they were directed to be prepared; A. not knowing of the mortgage to B. till he received the mortgage to himself, and having no knowledge of the assignment until after it was executed and delivered, and never afterwards assenting thereto. The mortgage to B. having been adjudged void, because it was *part* of the assignment, and in contravention of the statute, it was held that A.'s mortgage was not part of the assignment; that it was valid by the common law; and that he was entitled to hold the mortgaged property against the attaching creditors of

[1] Fairbanks v. Haynes, 23 Pick. 323.

[2] Shaw, C. J., Id. 325.

the mortgagor, in the same manner and to the same extent as if the mortgage to B. had not been made.[1]

The same general doctrine has been established in New Hampshire and Connecticut. Thus, in the former State, a mortgage executed by a debtor on the same day on which he made an assignment, does not necessarily render the assignment invalid. It is, however, a circumstance to excite suspicion; and if it was part of the same transaction, and resorted to in order to secure a preference to the mortgagee, it will defeat the assignment.[2] So, in Connecticut, where a debtor in failing circumstances, and with a view to his insolvency, mortgaged his estate to three of his creditors, to secure them for indorsements made by them severally for him, and afterwards on the same day made a general assignment of his property, including the mortgaged premises, to two of said creditors in trust for all his creditors, under the statute of 1828, c. 3—it was held that the mortgage and assignment, not executed at the same time, though on the same day, not between the same parties, and diverse in their nature and object, were not to be deemed parts of the same transaction; and both instruments were accordingly held valid.[3]

In a case in Iowa, a debtor made five chattel mortgages to secure several creditors, on two succeeding days, and on the last day executed a deed of trust to secure several other creditors therein named; the instruments covered the same goods, and each recited that it was subject to those preceding; the deed of trust, in addition to the goods and chattels, covered certain parcels of real estate; they were filed, at intervals of five minutes intervening between each, until all were filed. It was held that the transaction amounted, in a legal effect, to a general assignment, and was void as creating preferences.[4]

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[1] Housatonic Bank v. Martin, 1 Metc. 294.

[2] Rundlett v. Dole, 10 N. H. 458.

[3] Bates v. Cole, 10 Conn. 280.

[4] Burrows v. Lehndorf, 8 Iowa, 96.

So in another case,[1] in the same State, where a debtor conveyed a portion of his property to two creditors, by mortgage, without their knowledge, and at the same time conveyed the remainder to a trustee by an assignment for the benefit of his creditors, all of which was done with a view to insolvency—it was held a general assignment in which creditors were preferred, and therefore void.

But in a later case,[2] in the same State, where an insolvent firm executed a deed of certain property to one of their creditors, transferred certain negotiable paper and cash to another creditor, paid another creditor in full, and on the same day executed a general assignment of the remainder of their property for the benefit of remaining creditors *pro rata*—it was held competent for the debtor to give preferences by these means. The court, referring to the cases above cited, distinguished them on the ground that the conveyances were made without any knowledge on the part of the creditors, and the case is said to have been exceptional. Mr. Justice Cole, in delivering the opinion of the court, makes use of the following observations: "The fact that the two or more conveyances were made at nearly the same time, has no necessary influence upon determining their *identity of transaction.* To illustrate: a debtor may execute, at the same time, two notes to different creditors for different debts; but their being executed at the same time has no necessary tendency to show them to be one and the same transaction. So, also, an absolute deed may have been given to secure a loan, and the defeasance may be executed a year or two after, and notwithstanding the difference of time of execution, they are taken and treated as one transaction and parts of the same transfer. They are so treated because they are between the same parties, and relate to the same subject-matter, and are based upon the same consideration."[3]

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[1] Cole v. Dealham, 13 Iowa, 551.

[2] Lampson v. Arnold, 19 Iowa, 480.

[3] Citing Henshaw v. Sumner, 23 Pick. 446; Brown v. Foster, 2 Metc. 152; Bates v. Coe, 10 Conn. 280; see Lampson v. Arnold, *supra*, affirmed in Lyon v.

In a case in Ohio,[1] a debtor assigned all his personal property for the benefit of creditors, and also executed to the assignee a mortgage upon real estate for their benefit; the debtor subsequently sold part of the mortgaged property to a third person, who agreed to pay a part of the purchase money by assuming and paying to the assignee a specified sum, which the assignee had agreed to take for a release of the mortgage lien upon the part sold; the assignee accordingly released the mortgage lien upon the record, and took the purchaser's note for the specified amount. It was held that the real consideration of the note was the release of the mortgage lien, and the fact that the debtor refused to execute his contract of sale, was no good defense to an action upon the note by the assignee against the purchaser.

§ 356. *Assignments in Connection with Judgments.*— An invalid assignment will sometimes have the effect of rendering void a judgment confessed by the debtor in connection with it. Thus, in New York, where a debtor, after executing certain assignments, and fearing that they might not prove valid on account of certain reservations in his own favor, confessed a judgment to the same trustees upon the same trusts for creditors, but without the reservation, which judgment was intended to be resorted to only in case the assignments should not be adjudged valid, it was held that both were void—the intention to use the judgment only in case the assignments should be adjudged invalid, connecting the judgment, and infecting it with the vices of

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McIlvaine, 24 Iowa, 9. In Mower v. Hanford (6 Minn. 535), Mr. Justice Atwater said: "There is no conclusion of law from the fact that several deeds were executed on the same day with the making of the assignment, that they were all one act, or parts of the same transaction. This is a question of fact solely for the jury." And see Lord v. Fisher, 19 Ind. 7; Wynkoop v. Shardlow, 44 Barb. 84; Holt v. Bancroft, 30 Ala. 195; Cummings v. McCullough, 5 Ala. 324. In Berry v. Cutts (42 Me. 445), where a debtor, for the purpose of giving a preference to one class of creditors over another, executed different instruments, though not of the same date, nor executed at the same time, they were deemed in law one transaction, and void under the statute, as not providing for an equal distribution.

[1] Keen v. Hall, 31 Ohio St. 107.

the assignments.[1] But where a judgment was confessed by a debtor to a creditor, to secure the debts due to him and others, and some months afterwards an assignment was executed to the same creditor in trust, to pay substantially the same debts provided for by the judgment, it was held that the judgment and assignment did not constitute one transaction, and the judgment was not impaired by the abortive attempt to aid it by the assignment.[2] In another case, where a debtor confessed a judgment to certain creditors, on which execution was issued and levied, and afterwards, and on the same day, executed an assignment to the same creditors, in trust to pay themselves and others, which assignment was declared to be collateral to the judgment and levy, and intended as additional security to the judgment creditors, and was not, in any event, to stand in conflict with, or lessen, abate, or affect the execution or the force and effect of the levy, and the lien created thereby, it was held that the assignment was void as containing objectionable provisions, and that the judgment was likewise fraudulent and invalid.[3]

In Alabama, where a debtor who secured a debt by a deed of trust, on a defect in the deed being discovered, confessed a judgment to the creditor, under which the property was afterwards sold, it was held to be no fraud upon the other creditors.[4]

In a case in New Jersey,[5] a debtor executed a mortgage to three of his creditors, to secure notes made to them and

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[1] Mackie v. Cairns, 5 Cow. 547; see D'Ivernois v. Leavitt, 23 Barb. 63, 64. So in the case of Mitchell v. Gendell (7 Phila. 107), where an assignment was made in trust for the benefit of creditors which was not recorded, and by an arrangement between the parties, a sheriff's sale was had, at which the assignees became the purchasers, they agreeing to hold the property in trust for the purposes of the assignment, it was held that such an assignment was void, and the title of the assignees was not aided by the sheriff's sale.

[2] Lansing v. Woodworth, 1 Sandf. Ch. 43, 45.

[3] Dunham v. Waterman, 17 N. Y. 9; rev'g 3 Duer, 166; and see D'Ivernois v. Leavitt, 23 Barb. 63.

[4] McBroom v. Turner, 1 Stew. 72.

[5] Livermore v. McNair, 34 N. J. Eq. 478.

payable in instalments. He also confessed judgment to a creditor, under which his personal property was sold and bought in by one of his said three creditors, and transferred by him to the debtor's wife upon her executing a chattel mortgage for the full amount of the purchase money. The object of the mortgage as stated by the debtor was to prevent the sale of his property, so that he might, from its advance in value and the profits of his business, be able to pay off all his indebtedness. It was held that the mortgage and judgment were in contravention of both the statute regulating assignments and the statute of frauds.

Where the assignor had confessed a judgment in favor of one of the assignees six days before the execution of the assignment, and there was proof tending to connect the assignee with the assignor in the fraudulent disposition of his property, the fact that this judgment was confessed to the assignee at that juncture is a proper circumstance to go to the jury in an action in which the assignment is impeached.[1]

§ 357. *Assignments in Connection with other Transfers.* —In Massachusetts, it was held under the statute of 1836, c. 238, that an assignment was not made void (on the ground of giving preferences) by the delivery by the debtor of certain property, such as notes and goods, to certain creditors, the day before making the assignment, or even on the same day, before executing the assignment,[2] although the debtor afterwards made these preferred creditors his assignees.[3]

And where, simultaneously with an assignment of real and personal estate by two partners, for the benefit of such creditors as should become parties, one of the assignors conveyed some real estate (a pew) to the assignees by a separate deed, for the purpose of the assignment, it was held to be no objection to the assignment, although the assignors had made oath that *by the assignment* they had conveyed all their property, the court observing that both conveyances

[1] Main v. Lynch, 54 Md. 658.

[2] Brown v. Foster, 2 Metc. 152; Macomber v. Weeks, 3 Id. 412. [3] Id. ibid.

being made to the same parties, for the same purpose, and subject to the same trusts, it could not be material under which the pew was holden, and that the fairest way of treating them would be to consider them as one legal act, the deed being subsidiary to the assignment.[1]

But where a debtor conveyed personal property to trustees for the benefit of his wife, with authority to them to loan its value to himself, taking his note, and the note was accordingly given to the trustees, the property continuing in the debtor's possession, and the debtor afterwards assigned the property for the benefit of creditors, making the note a preferred debt, it was held that the assignment was fraudulent as against creditors of the debtor who became such after the note to the trustees was given.[2] And where a merchant who was insolvent and had been sued, sold all his stock to his confidential clerk, and took notes payable from three to eighteen months, under an arrangement that the clerk should continue the business with the merchant's sister, who was to be allowed to draw out an annual sum for the merchant's benefit, and the merchant assigned the notes to an assignee, for the benefit of the latter and other preferred creditors—it was held that the sale was fraudulent and void as against creditors who had not affirmed the assignment; that the assignee was not such a *bona fide* purchaser as would be protected in the notes or their proceeds; that the acceptance of the assignment by the assignee would not bind other creditors; and that a creditor who was such at the time of the sale, might, upon recovering judgment, and the return of the execution unsatisfied, maintain a bill to set aside the conveyance, and follow the proceeds of the property sold through any number of intermediate assignees, until they were lodged in the hands of a creditor in good faith, who had received and applied them upon his debt, or of a *bona fide* purchaser without notice of the fraud.[3]

[1] Woodward v. Marshall, 22 Pick. 468; Morton, J., Id. 474.

[2] Fiedler v. Day, 2 Sandf. S. C. 594.

[3] Cooke v. Smith, 3 Sandf. Ch. 333. In Loeschick v. Baldwin (38 N. Y. 326),

A conveyance of real estate does not invalidate an assignment made the next day, if it was a complete and independent transaction, done without contemplating an assignment, and it is for the jury to determine whether it was or not.[1]

Where a debtor makes a fraudulent transfer of his whole property, in order to defraud a judgment creditor, he cannot, by a mere voluntary assignment of his property and effects to a trustee for the benefit of all his creditors, prevent an assignee of the judgment creditor from bringing an action in the nature of a bill in equity against the debtor and the purchaser, to subject the property fraudulently transferred, or its proceeds, to the payment of the judgment.[2]

§ 358. *Assignments in Connection with Subsequent Instruments.*—Where a failing debtor assigned by deed all his property in trust for certain creditors in full payment, and the surplus *pro rata* to such other creditors only as should give him a discharge; and delivered his books and the key of his store to the assignee; and four days afterwards executed a writing referring to said assignment, and confirming it except as to the provision for a discharge, it was held that such writing was a new and valid assignment, and that the assignee was entitled to a reasonable time after its execution to take possession of the property.[3]

§ 359. *Assignments in Connection with Other Assignments.*—A conveyance apparently valid cannot be deemed fraudulent merely because the same grantors had previously made a conveyance of the same property, which was aban-

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where the debtor sold certain of his property on long credits, and a short time thereafter executed a general assignment, it was sought to show that the sale on credit was made with the intention of making the assignment, and the court said that if this had been shown, the creditors would have been delayed and the assignment would for that reason have been fraudulent and void as to the creditors so delayed. The question of fact, however, was found otherwise.

[1] Coots v. Chamberlain, 39 Mich. 565.

[2] Leach v. Kelsey, 7 Barb. S. C. 466. In Ogden v. Peters (15 Barb. 560), the court did not think it necessary to decide the question, "whether a fraudulent transfer by an insolvent debtor, of a part of his property, would invalidate a subsequent assignment of the residue for the benefit of his creditors." s. c. 21 N.Y. 23.

[3] Ingraham v. Wheeler, 6 Conn. 227. As to the effect of subsequent instruments executed by the creditors, see Coddington v. Davis, 1 N. Y. 186.

doned as fraudulent and void.[1] In a case in New York, where a voidable assignment was surrendered up to the assignor, and a new one taken upon trusts which were valid, it was held that a creditor who did not claim under the first assignment, and who had not acquired a legal or equitable lien upon the trust property, or a right of preference previous to the execution of the last assignment, would not impeach the second assignment on account of any illegality in the first.[2]

. In a case in North Carolina, where a debtor conveyed certain property in trust to pay a particular debt, and the surplus after such payment to be returned to him, and at the same time expressed his intention, by parol, that three other creditors should be paid out of the surplus, and that he would give orders to that effect as soon as he had had a settlement with such creditors—this was held to be no defense to a bill filed against this trustee for an account, by a second trustee to whom the same property was conveyed a day afterward in trust for the payment of other creditors, the mere intention to secure the creditors having no operation until carried out by some formal and legal act on the part of the debtor; and from the power to do such an act he had cut himself off by executing the second deed.[3]

In a case in New York, where two persons who were partners assigned all their partnership property and effects to trustees to pay the creditors of the firm, giving preferences to certain classes of the creditors, and directed the surplus of the assigned property to be paid to the assignors; and one of the copartners afterwards made an assignment of all his property and effects to a trustee, to be applied in the first place to the payment of his individual creditors, and the

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[1] Vernon v. Morton, 8 Dana, 247.

[2] Mills v. Argall, 6 Paige, 577. *Aliter* where creditors have acquired liens. See Porter v. Williams, 9 N. Y. 142; and see Seal v. Duffy, 4 Barr, 274; Johnson v. Whitewell, 7 Pick. 71; Gardner v. Commercial Nat. Bank, R. I. Index N, 33; *ante*, p. 535. As to amending and revoking assignments, see *ante*, Chap. XVII, and *post*, Chap. XXVII.

[3] Palmer v. Yarborough, 1 Ired. Eq. 310.

residue, if any, to be applied to the payment of such of the partnership debts as were not included in the first class of debts provided for in the previous assignment—it was held that the assignment of the copartnership effects was valid as against the creditors of the firm, even if there were individual creditors of the assignors at the time of making the assignment.[1]

§ 360. *Assignments in Connection with Releases.*—In a case in New York,[2] where certain creditors had executed a conditional release on payment of fifty per cent. of their claim, and the debtors failed to comply with the terms of the release, and subsequently executed a general assignment, by which they preferred, first, certain confidential creditors; secondly, the creditors who had executed the conditional release; and, thirdly, the residue of the creditors were to be paid—the release was not regarded as a part of the transaction so as to make the preference conditional.

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[1] Bogert v. Haight, 9 Paige, 297.

[2] Spaulding v. Strong, 37 N. Y. 155; rev'g s. c. 36 Barb. 310; and see Renard v. Graydon, 39 Barb. 548; Powers v. Graydon, 10 Bosw. 630.

CHAPTER XXVII.

REVOCATION AND CANCELLATION OF ASSIGNMENTS.

§ 361. An assignment should always be drawn with such care and deliberation as to render no act on the part of the assignor, in the way of change or correction of the instrument, necessary after execution. There have been cases, however, in which, after the execution and delivery of an assignment, it has been thought advisable or actually necessary that a new and different instrument should be substituted; and various modes have been adopted of disposing of the deed already executed—such as a formal revocation by the assignor's own act, a mere abandonment of the deed,[1] an arrangement between the assignor and assignee, by which the latter surrenders the assignment with the view of taking a new assignment,[2] or a distinct reassignment of the property for the same purpose;[3] and sometimes these acts are done with the concurrence of other parties.[4] Under what circumstances, and to what extent, such acts of *revocation* or *cancellation* of an assignment once executed and delivered are valid, so as to have the effect intended by them, are important considerations, which claim some attention in closing the present division of the subject.[5]

In England, as has been shown under a previous head, the doctrine seems to be now established, that instruments of provision for creditors, corresponding with our deeds of assignment, to which no creditor is a party or privy, are

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[1] Vernon v. Morton, 8 Dana, 247. [2] Mills v. Argall, 6 Paige, 577.

[3] Hone v. Woolsey, 2 Edw. Ch. 289; Small v. Sproat, 3 Metc. 303.

[4] As to what amounts to an annulling of an assignment, see Ward v. Lewis, 4 Pick. 520.

[5] In connection with the subject of this chapter, see *ante*, Chap. XVII.

revocable at the pleasure of the assignor.[1] But in the United States, where, as a general rule, the assent of creditors, or their union as parties to the assignment, is not necessary to its validity, the prevailing doctrine is, that an assignment in trust for creditors, executed and delivered by the assignor and accepted by the assignee, creates at once the relation of trustee and *cestui que trust* between the assignee and the creditors, and cannot be revoked by the assignor,[2] or annulled by the joint act of the assignor and assignee.[3] The application of this doctrine, however, appears to depend considerably upon circumstances, such as the time of the revocation or cancellation, the motive or purpose of the act, and the assent or dissent of creditors.

§ 362. Thus, after the rights of creditors have once actually attached,[4] or after notice of the assignment to those provided for by it,[5] or after notice by creditors to the assignee of their desire and intention to avail themselves of the assignment,[6] or after they have taken steps to enforce the trust, as by filing a bill praying for the distribution of the

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[1] See *ante*, pp. 167, 168, note 2.

[2] Hall v. Dennison, 17 Vt. 310; Walker v. Crowder, 2 Ired. Eq. 478, 485; Ingram v. Kirkpatrick, 6 Ired. Eq. 462; Sevier v. McWhorter, 27 Miss. 442; Furman v. Fisher, 4 Cold. (Tenn.) 626; Brown v. Chamberlain, 9 Fla. 464; Hyde v. Olds, 12 Ohio St. 591; Sheldon v. Smith, 28 Barb. 598. But in some cases it has been held that the assignment was revocable until there was an express acceptance on the part of the creditors. Galt v. Dibrell, 10 Yerg. (Tenn.) 626; Brevard v. Neely, 2 Sneed (Tenn.), 164; Mills v. Harris, 3 Head (Tenn.), 332; Gibson v. Chedic, 1 Nev. 497; McKinley v. Combe, 1 Mont. 105; Pitts v. Viley, 4 Bibb, 446. The assent of creditors to a fraudulent assignment will not be presumed. Ashley v. Robinson, 29 Ala. 112; and see cases *ante*, pp. 414, 415. Nor will their assent be assumed where no action has been taken under the assignment for many years. Gibson v. Rees, 50 Ill. 383.

[3] See Ward v. Lewis, 4 Pick. 522. The destruction of an assignment with the consent of the assignor and assignee, after acceptance by the latter, will not divest the assignee of his title and revest it in the assignor. The trust still exists, and the court will establish and execute it. Alpaugh v. Roberson, 27 N. J. Eq. 96; Metcalf v. Van Brunt, 37 Barb. 621; In Re Backer, 2 Abb. N. C. 379.

[4] McCoun, V. C., in Hone v. Woolsey, 2 Edw. Ch. 289, 292; Whitcomb v. Fowle, 7 Abb. N. C. 295. Assignments may be revoked or corrected at any time before the rights of creditors have become fixed under them. First Nat. Bank v. Hughes, 10 Mo. App. 7.

[5] Petrikin v. Davis, 1 Morris, 296.

[6] Ward v. Lewis, *ubi supra;* Brevard v. Neely, 2 Sneed, 164; Brown v. Chamberlain, 9 Fla. 464.

fund according to the provisions of the deed,[1] or after any of the trusts have been actually executed[2]—it is too late to revoke the assignment. Especially is this the case where the assignment was avowedly made for the particular benefit of some creditor, of which the new or substituted instrument is intended to deprive him. Thus, where a debtor assigned property to K. in trust, to pay the assignee and M., another creditor, giving M.'s debt the preference; and subsequently the assignor and assignee, without the knowledge or consent of M., canceled the deed; and the assignor executed another assignment, putting M., K. and certain other creditors on an equality; and the fund proved insufficient—it was held that the canceling of the first assignment was void as to M., and the trustees in the second were decreed to pay him in full.[3]

But where the object and purpose of the revocation is the correction of some error, or the expurgation of some objectionable feature, so as to give the instrument its fullest legal effect, it is more favored, and whatever consistent with the rights of creditors will be sustained. Thus, where debtors made an assignment to trustees for their creditors, which contained a clause constructively fraudulent, and the trustees re-assigned all the property to the assignors, who then made another assignment to the same trustees, which was unobjectionable on its face; and a judgment creditor filed a bill some days after the second assignment was executed —the court sustained the latter assignment.[4]

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[1] Robertson v. Sublett, 6 Humph. 313; Jones v. Dougherty, 10 Ga. 273.

[2] Petrikin v. Davis, *ubi supra;* Gibson v. Rees, 50 Ill. 383; Dwight v. Overton, 35 Tex. 390; Furman v. Fisher, 4 Cold. (Tenn.) 626; Galt v. Dibrell, 10 Yerg. (Tenn.) 146, 158; Brevard v. Neely, 2 Sneed (Tenn.), 164.

[3] Messonier v. Kauman, 3 Johns. Ch. 3.

[4] Hone v. Woolsey, 2 Edw. Ch. 289. The vice-chancellor in this case dwelt on the distinction between a void and a voidable deed. The assignment, he observed, "was not a nullity; it was voidable only as between the assignors and assignees; the title passed, and a trust was created for creditors upon the trusts and conditions contained in it. None of the creditors came forward to accept the property upon those terms; and it appears to me that, before the rights of any of the creditors had actually attached as *cestuis que trust* under the assignment, and before any of them were in a situation to acquire liens by virtue of judgments and executions returned, and the filing of bills, the parties were at liberty to do any

Assignments are sometimes canceled with the consent of creditors, or at their instance. Thus, in Massachusetts, where an insolvent debtor made an assignment under the statute of 1836, c. 238, of all his property, which was insufficient to satisfy the debts of the creditors who had a right to become parties to the assignment; and the assignees, with the consent of all those creditors, reconveyed the property to the assignor for the purpose of enabling him to make an adjustment with them—it was held that the assignees could not be charged, in the process of foreign attachment, as the trustees of one who became a creditor of the assignor after the assignment was made.[1]

In a case in Nevada,[2] the debtors obtained an agreement from their creditors to extend the time of payment for six or twelve months, and made an assignment to a trustee, who was to control and manage the property for the mutual benefit of the creditors, and to pay the debts *pro rata* as fast as there was money coming into his hands. It was held that after the expiration of one year the creditors could bring their action at law for the purpose of obtaining a judgment for the amount due, the same as if no agreement or assignment had been made.

The death of a debtor who has assigned his property to trustees for the benefit of creditors, does not operate as a revocation of the trust.[3]

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further acts by which the assigned property might be held by the assignees upon similar trusts, but divested of the objectionable features of the first instrument." Id. 292. And see Merrill v. Englesby, 28 Vt. 150; Conkling v. Conrad, 6 Ohio, 611; Conkling v. Carson, 11 Ill. 503; Brahe v. Eldridge, 17 Wis. 184; Gardner v. Commercial Nat. Bank, R. I. Index N, 33. A deed of trust after acceptance is irrevocable, in the sense that the assignor has no power to change its terms, though it was his purpose to have made the deed differently. Where the assignor, assignee, and creditors have made a mutual mistake, the deed may be corrected so as to conform to the previous agreement, and understanding of all the parties. The corrected deed in this case was not allowed, because the case failed to show that either the assignee or any of the beneficiaries were parties to any negotiations previous to the execution of the deed, or had any knowledge of the assignor's purpose to secure a debt not provided for by mistake in the first deed, or ever assented that the deed should be so executed. Barker v. Harlan, 8 Lea (Tenn.), 505.

[1] Small v. Sproat, 3 Metc. 303.

[2] Empey v. Sherwood, 12 Nev. 355.

[3] Jones v. Dougherty, 10 Ga. 273; Dwight v. Overton, 35 Tex. 390.

CHAPTER XXVIII.

PROCEEDINGS BY THE ASSIGNEE, IN EXECUTION OF THE TRUST.—GENERAL OUTLINE OF THE PROCEEDINGS, AND OF THE DUTIES, POWERS, AND LIABILITY OF ASSIGNEES.

§ 363. In the preceding chapters, a view has been presented of the acts of the *assignor* in creating the trust, by execution of the deed of assignment, and of the nature, operation, and other incidents of the instrument itself. The next general division of the subject embraces the acts and proceedings of the *assignee*, in execution of the trust, of which an outline will now be given.

The assignee,[1] on receiving the assignment from the debtor, either declines or accepts the trust proposed by it.

If he decline the trust (which is not probable, if a proper understanding have been had with the assignor, or if the assignment has actually been executed by the assignee), a court of equity will interpose, and (as has already been shown)[2] either appoint a new trustee, or take upon itself the execution of the trust.

If he accept the trust, he immediately enters upon the duties of the office, by giving public *notice* of the assignment (where such notice is necessary),[3] executing, in some States, a *bond* with sureties for the faithful performance of the trust,[4] and *taking possession* of the property mentioned in the assignment or schedules.[5] Measures are then taken for the *collection* of the debts assigned, and preparations made for exposing the property for *sale*, at the earliest prac-

[1] The *assignee* is here spoken of in the singular number, as most appropriate to the general form of expression used in the text, and as comprehending the widest range of actual cases. The necessary variation, where there are several assignees, will be supplied by the reader.

[2] *Ante*, Chap. XVIII.

[3] See *post*, Chap. XXIX.

[4] See *post*, Chap. XXX.

[5] See *post*, Chap. XXX.

ticable period.[1] Out of the proceeds of the sale and collections, after deducting the expenses of the trust,[2] *distribution* is made among the creditors entitled under the assignment, and dividends are usually paid from time to time, as moneys come to the assignee's hands.[3] If any surplus remain, after payment of all the debts, it is paid to the assignor,[4] and the trust is closed by a general accounting (either of course, or on the requisition of parties entitled to demand it), within the time limited by the assignment itself, or by statute, or such time as may be allowed as reasonable for the purpose.[5]

The *duty* of an assignee, as it may be generally expressed, is to proceed with as little delay as possible, consistently with the interests of the creditors, in converting the assets into money,[6] and applying the same in payment of the parties entitled under the assignment. In the execution of the trust, he must be governed by the directions contained in the assignment itself, where they are not overruled by statute, subject to such supervision as may be exercised by the proper court, and in general he is bound to manage and employ the trust property for the benefit of the creditors, with the care and diligence of a prudent owner.[7]

§ 364. As incident and essential to the performance of his duties, the assignee is clothed with the necessary *powers* to obtain possession of the property assigned, and to collect the debts by process of law. These powers are usually given in terms by the assignment itself, and sometimes they are expressly defined by statute, of which more will be said under another head.[8]

§ 365. The *liability* of the assignee follows as a legal con-

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[1] See *post*, Chaps. XXXIV, XXXV.
[2] See *post*, Chap. XXXVI.
[3] See *post*, Chap. XXXVII.
[4] See *post*, Chap. XXXVIII.
[5] See *post*, Chap. XXXIX.
[6] Morton, J., in Woodward v. Marshall, 22 Pick. 474.
[7] Litchfield v. White, 3 Sandf. S. C. 545; see *post*, Chap. XXXII.
[8] See *post*, Chap. XXXII.

sequence of his acceptance of the trust, and the duties which the assignment devolves upon him.[1] It is frequently expressly assumed by his becoming a formal covenanting party to the instrument,[2] and is further secured by bonds with sureties, which are sometimes required by statute.[3] The assignee is personally responsible for an abuse of the trust, and if he is guilty of misconduct, may be called to account, and, if necessary, removed from his office. But he is protected when he acts in good faith, even under a void assignment.[4]

The Court of Chancery, or Supreme Court having equity powers, is the proper tribunal before which an assignee may be called to account, unless a different provision has been made by statute. In some of the States, particular courts are designated as having special jurisdiction over assignees and their accounts; as, in Connecticut the Court of Probate,[5] in New Jersey the Orphan's Court of the county,[6] in Pennsylvania the Court of Common Pleas of the county,[7] in Missouri the Circuit Court,[8] in Vermont the Chancellor of the Circuit.[9]

More will be said of the duties, rights, powers, and liabilities of assignees, under the appropriate heads in the following chapters.

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[1] See *ante*, p. 357.

[2] See *ante*, p. 357.

[3] See *post*, Chap. XXXI.

[4] See further, as to the liability of assignees, *post*, Chap. XL.

[5] Rev. Stat. (ed. 1875), p. 378 *et seq.*

[6] Rev. Stat. (ed. 1847), p. 318, § 7.

[7] Act of June 14, 1836; Dunlop's L. (ed. 1853), p. 688; Purdon's Dig. (ed. 1857), pp. 802–805.

[8] 1 Rev. Stat. (ed. 1855), c. 8, p. 202.

[9] Act of November 19, 1852, §§ 6, 7; Laws of 1852, p. 15.

CHAPTER XXIX.

NOTICE OF THE ASSIGNMENT.

One of the first acts of the assignee, on receiving the assignment, is to give public *notice* of it, which is usually done by advertisement in one or more newspapers, stating, in substance, that the debtor has made an assignment of all his estate to the assignee, for the benefit of his creditors, and requesting creditors to present their claims, and debtors to account and make payment to him.

§ 366. *By Statute.*—In some States, notice of the assignment is expressly required by statute. Thus, in Maine, the assignee is required to give notice of the assignment within fourteen days after its execution, by advertisement for three weeks successively in some newspaper, if any, printed in the county where either assignor lives; if not, in the State paper; and three months from the execution of the assignment are allowed to creditors to become parties.[1] In New Jersey, the assignee, on assuming the trust, is required to give three weeks' public notice to the creditors that the assignment has been made, and that the creditors present their claims under oath or affirmation. Such notice is to be given by advertising in two of the newspapers printed in the State, circulating in the neighborhood where the creditors reside, and one or more newspapers in any other State where it shall be known that any creditor of the assignor resides.[2] In Massachusetts, under the statute of 1836, the assignees were required, as soon as might be after the assignment, to give notice thereof by advertisement, which was required to be published not less than once a week, for three weeks suc-

[1] Rev. Stat. (ed. 1857), c. 70, p. 438, § 4; see *ante*, p. 32.

[2] Rev. Stat. (ed. 1878), p. 87, § 3.

cessively.[1] In Missouri, the assignee, after appointing a day within three months after the date of the assignment, and a place when and where he will proceed to adjust and allow demands against the estate, is required to give notice of such time and place, by advertisement published in some newspaper printed in the county, or if there be none, in the one nearest the place where the inventory is filed, for four weeks successively; and also, whenever the residence of any of the creditors is known to him, by letter, addressed to such creditors, at least four weeks before the appointed day.[2]

In Vermont, it is held that where an insolvent has assigned all his choses in action for the benefit of creditors, notice must be given to the debtors, as is required in ordinary cases of assignment of a chose in action, in order to perfect it as against *bona fide* creditors and subsequent purchasers.[3]

In New Hampshire, the assignee is required to forthwith give notice of his appointment by publication and by posting notices in the town where the debtor resided, and by such further notice to creditors residing out of the county, by mail or otherwise, as the judge may order, and for each week's neglect to give either of said notices, he shall be charged by the judge in his account the sum of five dollars.[4]

In Indiana, after complying with the requirements as to filing the assignment and schedules, taking the oath and giving the bond, the assignee is directed forthwith to give notice of his appointment, by publication three weeks successively in some newspaper printed and published in the county, if any there be, and if not, by written notices, put up in at least five of the most public places in the county, and by publication of the same in some newspaper printed and published nearest thereto, for the time and in the man-

[1] Stats of 1886, c. 238, § 5.
[2] R. S. of Mo. (1879), § 373.
[3] Ward v. Morrison, 25 Vt. 593.
[4] Gen. Stat. (ed. 1878), p. 337, c. 140, § 10.

ner mentioned in reference to publication in the county where the assignor resides.[1]

In Iowa, the assignee is required to forthwith give notice of the assignment by publication in some newspaper in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued, at least, six weeks, and shall also forthwith send a notice by mail to each creditor of whom he shall be informed, directed to their usual place of residence, and to notify the creditors to present their claims under oath to him, within three months thereafter.[2]

In New York, the county judge may, upon the petition of the assignee, authorize him to advertise for creditors to present to him their claims, with the vouchers therefor duly verified, on or before a day to be specified in such advertisement, not less than thirty days from the last publication thereof, which advertisement or notice shall be published in two newspapers, to be designated by the county judge, as most likely to give notice to the persons to be served, not less than once a week for six successive weeks; and, if it appears that any of such creditors reside out of the State, then in like manner in the State paper.[3]

In Ohio, the assignee is required to cause notice to be given in some newspaper of general circulation within the county, for three successive weeks, of his appointment as assignee.[4]

In Illinois,[5] the assignee or assignees named in the assignment are required to forthwith give notice thereof by publication in some newspaper published in the county, if any; and if none, then in the nearest county thereto, which publication shall be continued at least six weeks; and shall also

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[1] Stat. of Ind. (Davis, 1876), p. 143, § 6; 1 R. S. (1881), § 2667.

[2] Iowa Code (1880), § 2119.

[3] Laws of 1877, c. 466; 3 Rev. Stat. (7th ed.) p. 2277; see Matter of Groencke, 5 Abb. N. C. 298. As to the effect of this notice in protecting assignee upon accounting, see *post*, Chap. XXXIX.

[4] 2 R. S. (1880), § 6346.

[5] R. S. of Ill. (Cothran, 1881), p. 118.

forthwith send a notice thereof by mail to each creditor, of whom he or they shall be informed, directed to their usual place of residence, and notifying the creditors to present their claims under oath or affirmation to him within three months thereafter.

In Oregon,[1] the statute is substantially the same, and similar in Minnesota.[2]

In Texas,[3] it is provided that every assignee shall, within thirty days after the execution of the assignment, give public notice of his appointment in some newspaper printed in the county where the assignor resides, or where his principal business was conducted; or, if no newspaper be printed therein, then the newspaper published nearest to such place of residence or business, and which notice shall be published for three successive weeks, and so far as he can the assignee shall also give personal notice, or notice by mail, to each of the creditors of the assigning debtor.

In Wisconsin,[4] it is required by statute that within twelve days after the execution of the assignment, the assignee shall give notice of the making thereof, and of his post-office address, and that every creditor of such assignor is required to file, within three months, with such assignee or the clerk of the circuit court, naming him and his post-office address, on pain of being debarred a dividend, an affidavit setting forth his name, residence and post-office address, the nature, consideration and amount of his debt claimed by him, over and above all effects. Such notice shall be given by publishing the same once in each week for three successive weeks in a newspaper in the county; or, if none, in an adjoining county, and by mailing a copy of such notice to each creditor at his residence, of whom the assignee shall have information.

Notice is sometimes required to be given by the terms

[1] Laws of Oregon (1878), p. 37.
[2] Stats. of Minn. (1878), p. 545, § 26.
[3] Laws of Texas (1879), c. 58, p. 57; appendix to R. S. (1879), p. 5.
[4] R. S. of Wis. (1878), § 1698, p. 498.

or necessary effect of the assignment itself; in which case it must, of course, be complied with.

The recording of an assignment is, in some States, sufficient notice to creditors in the absence of fraud.[1]

§ 367. *Object and Effect of Notice.*—The object of giving notice of the assignment is to give publicity to the transaction for a twofold purpose—to apprise the creditors of the transfer, and to instruct them as to their proceedings to obtain its benefit; and to inform the debtors of the assignor, and persons having moneys or property belonging to him in their hands, to whom they are to account and to pay and deliver the same.[2]

A debtor on an open account, after notice of the assignment, cannot defeat the rights of the assignee by payment to the insolvent. In making his payment, every discount or equity existing at the time of the assignment is allowed; but after notice he cannot affect the assignee by discount or equity against the assignor, subsequently acquired.[3]

In Maine, no property assigned for the benefit of creditors is liable to attachment for six months after the first publication of the notice; nor is the assignee, during that time, liable to the trustee process on account thereof.[4]

§ 368. *Effect of Omission of Notice.*—But the neglect of the assignee to give the public notice required by the assignment, does not divest the title to the property assigned;[5]

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[1] Farquharson v. Eichelbergen, 15 Md. 63. But the filing of an assignment in the county clerk's office in New York is not constructive notice of the conveyance of real estate. Simon v. Kaliske, 6 Abb. Pr. N. S. 225.

[2] Quoted with approval in Switzer v. Miller, 58 Ind. 561.

[3] Tibbetts v. Weaver, 5 Strobh. 144; Mowry v. Crocker, 6 Wis. 326; Gordon v. Freeman, 11 Ill. 14; Walters v. Whitlock, 9 Fla. 86. An unrecorded deed of trust will prevail against a creditor who has notice thereof before he acquires a legal right. Forepaugh v. Appold, 17 B. Mon. (Ky.) 625 (B.) "Notice is indispensable to charge the debtor with the duty of payment to the assignee, so that if without notice he paid the debt to the assignor, or it was recovered by process against him, he would be discharged from the debt." Story's Confl. Laws, § 396.

[4] Rev. Stat. (ed. 1871), p. 544, c. 70, § 7; see *ante*, p. 32.

[5] See Baldwin v. Patton, 10 Watts, 60. But by statute in Maine (Rev. Stat. ed. 1871, p. 544, c. 70, § 4), the assignment is not valid unless the notice is given as required.

and it has been held not to be necessary that the creditors for whose benefit the assignment is made should have notice of it, provided they afterwards assent to the provisions made for their benefit.[1] And notice of the assignment to a bank in which the debtor has funds deposited, is held to be necessary only to prevent the bank from paying the deposit on the checks of the assignor, or from parting with the funds of the bank on the faith of the deposit still belonging to him.[2]

[1] Marbury v. Brooks, 7 Wheat. 556.

[2] Beckwith v. Union Bank, 4 Sandf. S. C. 604; affi'd on appeal, 9 N. Y. 211.

CHAPTER XXX.

TAKING POSSESSION OF THE PROPERTY ASSIGNED.

A very important act on the part of the assignee, on assuming the execution of the trust, is the *taking possession* of the property assigned.

The subject of the delivery of possession, on the part of the *assignor*, so far as it may be necessary to give validity and operation to the assignment, has already been considered in a former chapter.[1] It will be sufficient to add that no act should be omitted by the debtor, which can serve to express an absolute transfer of the possession, and an entire renunciation of all control over the property, so as to give every equality of reality and good faith to the transaction. Among the acts most expressive for this purpose, are the ordinary ones of delivery of the keys of the store or premises containing the goods assigned, together with all the assignor's books of account, and all evidence of debt or title to property.

§ 369. *Possession, how Taken.*—But the necessary change of possession should not be left to the action of the assignor. The *assignee* must himself be active; he must *take* possession, and not depend upon the assignor to give it. He should immediately enter on the premises where the business has been transacted, assume the management of the business itself,[2] take possession of the books of account,[3]

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[1] See *ante*, Chap. XIX.

[2] As to continuing the business, see *post*, Chap. XXXIII. In Mackintosh v. Corner (33 Md. 598), it is held that a delay of two or three days by the assignee in taking possession will not render the property liable to attachment.

[3] In a case in Illinois, where a debtor, to secure to certain creditors the amount of their debt, assigned to them all his "store books and accounts," so far as that they might select and collect the amount of certain notes, with expense, the books to be subject to their order from the date of the notes, and considered their property; and the debtor afterwards made a general assignment of his property, including his books, to trustees for the benefit of his creditors, it was held that the first assignment did not pass to the creditors the property in the books themselves,

divest the assignor of all control of the property,[1] and remove the usual indications of his ownership. The mere nominal appointment of the assignor as agent, and leaving him in possession, has been repeatedly held insufficient.[2] The property need not be taken into the manual possession of the assignee. If it comes into his actual custody and control it will be enough, although the delivery be merely symbolical or constructive. Thus a delivery of the keys of the place where the goods are stored may be sufficient to pass a valid title to the property.[3] The business, if continued, should not be permitted to go on as before; the change implied by the assignment must be made apparent by outward unequivocal acts, such as the presence and supervision of the assignee, and the keeping of the accounts under his direction. If the assignee neglect to exercise the authority with which he is clothed for this purpose, he will be superseded, and a receiver appointed.[4]

In a case in New York, where goods in a store were assigned by the owner in trust for the payment of creditors, but the goods, after the assignment, still remained in the actual possession of the assignor, and were sold by him and his former clerks, and by his wife, at private sale, and in the customary manner by retail, his name being still on the various signs of the store; and some of the goods were sold to pay an old debt, not included in the first class of creditors; and no inventory was made of the assigned goods, nor was there any list of the creditors; and the assignee

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but only in the accounts, and in them only so far as would be sufficient to pay their debt; that they came rightfully to the hands of the trustees, and that the creditors could not maintain replevin against them for the books, at least not until after a demand of the books. Hudson v. Maze, 3 Scam. 578.

[1] As to employing the assignor as agent, see *post*, p. 564; and see *ante*, p. 282.

[2] Butler v. Stoddard, 7 Paige, 163; Connah v. Sedgwick, 1 Barb. S. C. 210; Van Nest v. Yoe, 1 Sandf. Ch. 4; Currie v. Hart, 2 Id. 353; Wilson v. Ferguson, 10 How. Pr. 175; Cummings v. McCullough, 5 Ala. 324; Adams v. Davidson, 10 N. Y. 309; Smith v. Leavitts, 10 Ala. 92; Moffat v. Ingham, 7 Dana, 495; Parker v. Jervis, 3 Abb. Ct. App. Dec. 449; Ball v. Loomis, 29 N. Y. 412; Miller v. Halsey, 4 Abb. Pr. N. S. 28.

[3] Bullis v. Montgomery, 50 N.Y. 352; Vredenburg v. White, 1 Johns. Cas. 156.

[4] Connah v. Sedgwick, 1 Barb. S. C. 10; see Pine v. Rickert, 21 Id. 469.

made no sales himself, nor did he give any reason for suffering the property to remain under the control and subject to the disposal of the assignor—it was held that these were most suspicious circumstances, and that the conduct of the parties to the assignment was strong to show that the whole transaction was for the purpose of defrauding the creditors of the assignor.[1] In a case in Texas, where a merchant in failing circumstances made an assignment of his stock, book accounts, &c., to a trustee for the benefit of his creditors, preferring some to others, and afterward continued to manage and control the business, on what agreement did not appear, there being no provision therefor in the assignment, it was held that the trustee was, *prima facie* at least, responsible for the acts of the debtor, and that both parties must be deemed to have contemplated and intended, at the time of making the assignment, the course of conduct in their transactions and dealings with the property conveyed or pretended to be conveyed, which they afterwards adopted.[2] And in a case in Indiana, where an assignment embraced the house in which the assignor lived, the furniture in it not exempt from sale or execution, the premises on which was a tannery carried on by the assignor, with other property; and no visible change took place after the assignment in the relation between the assignor and assignees (who were young men in his employ); and the assignor and his family continued to occupy the house and furniture as before, and the assignees to board with them, and he and they still worked together in and about the tannery, these, together with other circumstances, were held to avoid the assignment.[3]

[1] Pine v. Rickert, 21 Barb. 469. And in Dolson v. Kerr, 5 Hun, 643, where, at the time of the execution of an assignment for the benefit of creditors, it was agreed between the assignor and assignees that they should lease all the assigned property to the wife of the assignor, which agreement was carried into effect, the assignees never taking possession of the property, but leaving it with the assignor and his wife—held that the assignment was void as tending to hinder, delay and defraud creditors.

[2] Wright v. Linn, 16 Tex. 34.

[3] Caldwell v. Williams, 1 Ind. 405, 407; and see Smith v. Mitchell, 12 Mich. 180; Flanigan v. Lampman, Id. 58; Constantine v. Twelves, 29 Ala. 607.

§ 370. *How far the Assignor may be left in Possession.*—What has been said as to a change of possession, consequent upon a voluntary assignment, is, of course, inapplicable in those States where such a change is not essential to the validity of the transfer.[1] But even where it is held to be indispensable, it does not imply an immediate and total exclusion of the assignor from the premises or property assigned. Thus, he may be left for a limited time in possession of the house or farm which he has occupied with his family, together with the furniture, implements, &c., necessary for such occupation, provided it be under the control of the assignee, and do not delay or interfere with the due execution of the trust. In a case in Connecticut, where the assignee, under an assignment made with a view to proceedings under the statute of 1828, permitted the assignor to remain in possession of part of the property assigned; to live in the house and on the farm; to have the custody and use of the farming tools, oxen and cows thereon; and to cultivate parts of the farm, and sell some of the timber, appropriating the avails to pay for labor on the land; but these acts were all done under the constant supervision of the assignee, and in furtherance of the objects of the assignment during the proceedings required by the statute; and it was found by a jury that there was no fraudulent design in the case—it was held that such continued possession and acts of the assignor did not render the assignment fraudulent in law.[2] And in a case in Michigan, where the assignees allowed one of the assignors to remain on a farm which was part of the real estate assigned, during a period when houses and farms were not usually rented, until they could find a purchaser for the farm,

[1] See *ante*, p. 400. In Flanigan v. Lampman (13 Mich. 58), Mr. Justice Christiancy made these observations: "Possession of the assigned property by the assignor, or his control over it after the assignment, has always been held to have a strong bearing upon the question of intent with which the assignment was made, and this species of evidence is perhaps more generally resorted to than any other to show a fraudulent intent in the execution of the instrument; and we think the whole conduct of the assignee with reference to the property after the assignment should be allowed to be shown as bearing upon the question of intent."

[2] Strong v. Carrier, 17 Conn. 319.

which was advertised for sale, the assignees in the meantime taking the crops from the premises, and expressing their intention to charge the assignor occupying the premises the fair rent—it was held that such fact, in the absence of any understanding that he should occupy them free of rent, could not be urged as evidence of a secret trust on behalf of the assignor.[1]

In regard to premises used for business purposes, and to business operations, the rule is usually more strict; but even in these cases, it is subject to the qualification noticed under the next head.

§ 371. *How far the Assignor may act as Agent of the Assignee.*—The object of the rule just mentioned, requiring a change in the possession of assigned property, and in the mode of transacting the assignor's business, is to exclude the assignor from all control over the property which he has formally transferred, and by this means to deprive him of the power of using it for his own benefit, and to the prejudice of the creditors. But it is not intended to interfere with the assignee's acknowledged rights to employ such assistance in executing the trust as he may find necessary or beneficial, nor to deprive him of the power of availing himself of the services of the assignor for the same purpose. Indeed, these services are in many cases important, and in some indispensable to the due and faithful execution of the trust;[2] and they are sometimes stipulated for in the terms of the assignment itself.[3] Hence it follows, that under his general power to appoint clerks and agents, the assignee may appoint the assignor himself to assist him, for a suitable compensation, in the capacity of clerk or agent, the assignee being always held responsible for his acts, in the same manner and to the same extent as for the acts of any other agent.[4] But an

[1] Hollister v. Loud, 2 Mich. 310; Wing, P. J., Id. 319.

[2] See the observations of the court in Vernon v. Morton, 8 Dana, 247, 252, and of Hoffman, A. V. C., in Hitchcock v. St. John, Hoff. Ch. 511.

[3] Marks v. Hill, 15 Gratt. 400.

[4] Hitchcock v. St. John, *ubi supra;* Nicholson v. Leavitt, 4 Sandf. S. C. 252, 272; s. c. 6 N. Y. 510; 10 N. Y. 591; Vernon v. Morton, *ubi supra;* Shattuck v. Freeman, 1 Metc. 10, 14; Clark v. Craig, 29 Mich. 398; Blow v. Gage, 44 Ill. 208;

agency of this kind must be an *actual*, and not a nominal one. It must be exercised in strict subordination to the assignee, whose paramount authority must not only be always acknowledged by the assignor, but made apparent by his own action. The difficulty of separating nominal agency from virtual ownership in many of these cases, has led the courts to look with suspicion upon such a relation created between the assignor and assignee. But it will not be regarded as, of itself, evidence of an original intent to defraud creditors.[1]

In Connecticut, the assignee is expressly empowered by statute to employ the assignor as his agent for the sale and disposal of the estate; but this is under several restrictions.

Hall v. Wheeler, 18 Ind. 371; Savery v. Spaulding, 8 Iowa, 239; Van Hook v. Walton, 28 Tex. 59; Ogden v. Peters, 21 N. Y. 23; Wilbur v. Fradenburgh, 52 Barb. 474; Pearson v. Rockhill, 4 B. Mon. (Ky.) 296; Casey v. Jones, 37 N. Y. 608; Gordon v. Cannon, 18 Gratt. 387; Beamish v. Conant, 24 How. Pr. 94; Tompkins v. Wheeler, 16 Pet. 106; Fitler v. Maitland, 3 W. & S. 307; Deckhard v. Case, 5 Watts, 22; Bump on Fraud. Conv. p. 380.

[1] Browning v. Hart, 6 Barb. S. C. 91; Nicholson v. Leavitt, *ubi supra*; see Jackson v. Cornell, 1 Sandf. Ch. 348; Olney v. Tanner, 10 Fed. Reptr. 101. The circumstance that the assignee constitutes the assignor his agent, is not alone sufficient to show that the assignment was made with fraudulent intent, especially when it appears that the assignee was not familiar with the business, and that he had confidence in the assignor, who was familiar with it. Wilbur v. Fradenburg, 52 Barb. 476. In a case in Illinois, where a debtor in failing circumstances, and after suit brought, made a bill of sale of a stock of goods, &c., to a creditor, by way of preference, and delivered them to the purchaser, who employed the trader as his agent and principal clerk, and leased to him the household furniture—it was held that, though the employment of the debtor was calculated to raise suspicion, yet, as the jury had given a verdict in favor of the purchaser, the court would not disturb it. Powers v. Green, 14 Ill 386. And in a case in Pennsylvania, where two brothers in failing circumstances sold the stock in trade of a coach manufactory to a third brother, in consideration of debts assumed by him for them; and he went into possession, and continued the business at the same place, had the sign changed to his own name, opened a set of books, and procured another book-keeper, the vendors remaining in his employ, each of them superintending a particular department of the work at stipulated wages—it was held that there was not such a want of corresponding change of possession, under the circumstances, as would authorize the court to say, as matter of law, that the sale was void as against creditors. Dunlap v. Bournonville, 26 Penn. St. 72. In Parker v. Jarvis, 3 Abb. Ct. App. Dec. 449, 453, at the time of executing the assignment the assignor delivered to the assignee the keys of the store for the purpose of giving him dominion over the property. The former clerks were discharged by the assignor and all again employed by the assignee to take charge of and remain with the goods of the assignee. They did so take charge, and held the goods for the assignee. The signs were taken down, and there was no evidence that the assignor ever exercised any control over the goods; this evidence was regarded as showing a fair case of delivery and continued change of possession.

Thus, it must be with the consent of the Court of Probate, and must be accompanied by public notice of such employment advertised for at least three successive weeks.[1] It is further provided that such assignor shall, in the execution of his agency, be under the control and direction of the trustee, and the trustee shall at all times be responsible for his fidelity and for the rendering of a true account of the property and of its disposal to the court.[2]

§ 372. *Liability of the Assignee on taking Possession.*— The assignee, as will be more particularly shown under another head,[3] takes the property of the debtor subject to all existing equities. And where he takes possession of goods which have been delivered conditionally on a sale to the debtor, the conditions not being performed, he is liable in equity to the seller for the proceeds of the goods, unless they have been applied under the trust without notice.[4]

§ 373. *Taking Possession of Property not in Assignor's Hands.*—The assignee is entitled to the possession of the debtor's property, wherever it may be, or in whosesoever hands. Where a vessel or cargo has been assigned while at sea, it will be sufficient if the assignee takes possession within a reasonable time after the property comes within his reach, by the arrival of the vessel.[5] If the vessel or goods are assigned while on the outward voyage, the assignee should, as soon as possible, give notice to the master; and if neither the vessel nor cargo return *in specie*, so that no possession can be taken,

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[1] Gen. Stat. (Rev. of 1875), p. 583, tit. 18, c. 11, § 24. But if such appointment is made without the assent of the Court of Probate, and before an inventory is returned, it renders the assignment fraudulent in the law and void as against creditors. Peck v. Whiting, 21 Conn. 206. This course, of publicly advertising the agency of the assignor, was approved by the assistant vice-chancellor, Hitchcock v. St. John, Hoff. Ch. 511, 521.

[2] Rev. Stat. (Rev. of 1875), p. 383, § 24.

[3] See *post*, Chap. XL.

[4] Haggerty v. Palmer, 6 Johns. Ch. 437.

[5] Wheeler v. Sumner, 4 Mason, 183; Meeker v. Wilson, 1 Gall. 419, 423, 425. The title of a foreign assignee to a vessel assigned while at sea was sustained against a levy made by the sheriff on her arrival. Moore v. Willett, 35 Barb. 663; see Kelly v. Crapo, 45 N. Y. 86; reversed, 16 Wall. 610; see *ante*, p. 438, note.

he should exhibit his title to the master and claim the proceeds of the property.[1]

It sometimes happens that property of the debtor embraced in the assignment, and conveyed by it, is in the hands of third persons claiming some lien upon it. In such cases, the assignee should take the necessary steps for ascertaining the particulars of such property, by demanding access to or inspection of it, or requiring an inventory of it; and also for ascertaining the nature and extent of the lien by requiring a statement and proof of the claim on which it is founded.[2]

A demand should be made in the name and by the authority of the assignee, accompanied by notice and evidence of such authority. A demand by the assignor will not enable the assignee to maintain his suit for conversion.[3]

In Connecticut, it has been provided by the statute regulating assignments, that whenever any person shall have in his custody or possession, or under his control, any goods or chattels belonging to an estate assigned, or any bills, bonds, notes, accounts, or anything belonging to such estate, whether claiming any lien thereon or not; and, on demand of the same by the trustee, shall refuse to deliver them, or give a satisfactory account of them to the trustee, or, if claiming to have a lien thereon, shall refuse to disclose the amount of his claim, and when and how the same accrued, and all particulars in relation thereto; or shall refuse to exhibit any document or writing relating thereto, or to furnish to the trustee an inventory of the property upon which he claims to have a lien, or to give the trustee and appraisers reasonable access to the assigned property, that they may make an inventory thereof, the Court of Probate in which the estate is pending for settlement, upon application of the

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[1] Parker, C. J., in Gardner v. Howland, 2 Pick. 599, 602; Dawes v. Cope, 4 Binn. 258; Bholen v. Cleveland, 5 Mason, 174; and see *ante*, p. 404. As to a constructive taking of possession, see *ante*, p. 404; Griffin v. Alsop, 4 Cal. 406.

[2] And see Mann v. Huston, 1 Gray, 250.

[3] See Griffin v. Alsop, 4 Cal. 406.

trustee, may cite such person to appear before it, and may examine him on oath concerning the matters complained of; and if such person shall refuse to appear, or be examined, or to answer the interrogatories put to him by the court, or to give reasonable access to the assigned property, the court may issue a warrant for the commitment of such person to prison.[1]

§ 374. *Taking Possession of Leasehold Premises.*— Where a debtor, being also a lessee of premises (such as a store used for the sale of goods), makes a general assignment of all his property for the benefit of his creditors, and the assignee simply accepts the assignment, he will not be bound as assignee of the lease, for the payment of rent to the landlord of the premises.[2]

The assignee has an election whether or not to take a lease of real estate held by the assignor, without affecting his right to the other property, but if he elects to accept the interest of the assignor, and to enter under it, he becomes so bound.[3] Taking possession of the premises, for the purpose of selling the goods assigned, and actually selling them thereon, amounts in law to such an acceptance,

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[1] Rev. Stat. (ed. 1875), p. 892, § 30.

[2] Pratt v. Levan, 1 Miles (Penn.) 358. But where the existence of the lease was not disclosed to the assignee, who collected from subtenants of a small portion of the demised premises, moneys specified in the assignment and schedules as due upon open account, which were in fact due as rent, he was not thereby made liable on the lease for rent accruing subsequent to the assignment. Dennistown v. Hubbell, 10 Bosw. 155; but see Jones v. Housman, 10 Bosw. 168.

[3] Goldthwaite, J., in Dorrance v. Jones, 27 Ala. 630, 633; citing Carter v. Hammett, 12 Barb. 253; Bourdilon v. Dalton, 1 Esp. Cas. 233; Copeland v. Stevens, 1 B. & Ald. 592. In the case of Hovarty v. Davis (16 Md. 312), which was very similar to Dorrance v. Jones in its facts, the court sustained the action for use and occupation, referring to and adopting the reasoning and authorities on which that case was based. The learned judge (Bistol) also referred to Tunner v. Richardson, 7 East, 336; and Gibson v. Courthope, 1 D. & R. 201; 16 Eng. C. L. 33. In Jermain v. Pattison, (46 Barb. 9), where the assignees leased the premises for the best they could obtain, and paid to the landlord all that they received, which was accepted by him, and they surrendered the possession, it was held that the assignees having fully administered and paid out according to the terms of the assignment all the moneys they had received from the assigned estate, could be charged *personally* only with the value of the use and occupation; and it seems in general that the liabilities of assignees are to be determined by the same rule which applies to executors.

and binds the assignee accordingly.[1] And it is immaterial how long the possession is retained, as when once the election is made, the assignee cannot recede from it.[2] The case is different where the assignee enters only for the purpose of obtaining possession of the goods.[3]

[1] Goldthwaite, J., *ubi supra*, citing Welch v. Myers, 4 Camp. 368; Clarke v. Hume, R. & M. 207; see the New York case of Muir v. Glinsman, in the Superior Court, Jan. Term, 1856. But in the case of Journeay v. Brackley, in the N. Y. Court of Common Pleas, different views were maintained by the court, and it was held that taking possession of the premises, and holding them for a short time for the purpose of selling off the stock of goods by auction, and making such sale within a reasonable time, do not constitute such acts of acceptance as to render the assignee liable on the covenants of the lease, for the payment of rent. Law Rep. March, 1858, vol. 10 (N. S.), p. 610.

[2] Goldthwaite, J., *ubi supra*.

[3] Id. ibid. citing Hanson v. Stephenson, 1 B. & Ad. 305.

CHAPTER XXXI.

INVENTORY AND APPRAISEMENT OF THE PROPERTY.—BOND BY THE ASSIGNEE.

§ 375. One of the earliest duties of an assignee is to ascertain the extent and particulars of the assigned property. A very material guide for this purpose is in the inventory or schedule annexed to the assignment itself. But if there be no schedule annexed, his first business will be to make or cause to be made, an exact *inventory* of the assets.[1]

In some of the States, before the assignee can proceed to act under the assignment, he is required by statute to have the property inventoried and *appraised*, and to give *bond* for the faithful execution of the trust. In Rhode Island, New Jersey, Pennsylvania, Missouri, and Indiana,[2] the inventory and appraisement are the first acts required. In Maine and Connecticut, the bond is first in order; one of the conditions of the bond in Maine being the return of an inventory.

§ 376. *Maine.*—Thus, in Maine, the assignee, before entering upon his duties, is required to give *bond* with sufficient sureties living in the county, to the judge of probate, in such sums as he orders, conditioned as follows: First, to make and return in the probate office, within ten days after the time allowed for creditors to become parties to the assignment,[3] a true *inventory*, on oath, of all the real estate, goods, chattels, rights, and credits of the assignor, which have come to his possession or knowledge, whether contained

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[1] See the observations of Sandford, A. V.C., in Cram v. Mitchell, 1 Sandf. Ch. 255.

[2] 1 Stat. of Ind. (ed. 1870), p. 114, § 67; R. S. (1881), § 2663; Black v. Weathers, 36 Ind. 242.

[3] This period is three months from the execution of the assignment. See *ante*, § 366. See Insolvent Law, *ante*, p. 32.

in the assignment or not, and the names of all the creditors who have become parties thereto, with a list of their respective claims; Second, to make proportional distribution of all the net proceeds of such estate among such creditors as become parties to the assignment; Third, to render a true account of his doings, on oath, to the judge of probate, within six months, and at any other time when cited by the judge.[1] This bond must be filed and approved by the judge within ten days after the execution of the assignment.[2]

The assignment is not valid against attaching creditors unless the bond is filed and approved by the judge of probate within ten days after the execution of the assignment.[3]

§ 377. In Vermont, the assignee is required to execute to the Probate Court for the district in which the assignor resides, a *bond* with sureties to the satisfaction of said court, conditioned for the faithful performance of the trust, and this bond is required to be given *at the time* of making the assignment.[4]

If a copy of the assignment and inventory and the bond are not executed and filed as required, the property assigned is liable to trustee process and to attachment and execution at the suit of the creditors of the assignor, the same as if no assignment had been made, but not after such copies and bond are so executed and filed, and so far the assignment is for such cause inoperative against creditors of the assignor, but no farther.[5]

§ 378. In Connecticut, the trustee is required to give good and sufficient *bond* with surety, to the judge of the Court of Probate and his successors in office, in such sum as the court shall require, conditioned for the faithful execution of the trust, according to law; and the courts may at any

[1] Rev. Stat. (ed. 1874), p. 544, c. 70, § 3.

[2] Id. § 5. [3] Id. § 5.

[4] Act of November 10, 1857, § 2; Laws of 1857, p. 13. This was in amendment of the act of November 14, 1855, § 2, which allowed ten days after the making of the assignment for the execution of the bond. Rev. Laws (1880), § 1889.

[5] Rev. Laws (1880), § 1890.

time require further bond with like condition, if, in their opinion, the bond already given is insufficient; and on failure of the trustee to procure such bond, the court may remove him and appoint another trustee in his stead.[1] The trustee is further required, with the assistance of two or more disinterested and judicious persons, under oath appointed by the court, to make within such time as the court shall prescribe, not exceeding two months from the time of making the assignment, a true and perfect *inventory* and *appraisement* of the estate assigned, according to its just value; and also to make an inventory of the credits and choses in action, and cause duplicates to be made of such inventories, one of which is to be sworn to by the trustee, and deposited with the court, and the other to remain with the trustee.[2]

§ 379. In Rhode Island, the assignee may be required, on application of any creditor interested in the assignment, and upon due notice and for cause shown, to render on oath to the supreme court an *inventory* of all the effects, estate, and credits conveyed by the assignment, so far as the same can be ascertained; and to give *bond* with sufficient sureties, for the faithful performance of the trusts. The power to require such inventory and bond is given to the Supreme Court, to which the inventory must be rendered. The bond must be given to the clerk of such court for the county where the assignor resided at the time of making the assignment and to the successor of such clerk, and is declared to inure to the benefit of all the creditors interested in the assignment.[3] If the assignee neglect or refuse to render such inventory, or give such bond when so required, the court is authorized to remove him, and to appoint one or more suitable persons to receive, hold, and dispose of the assigned property, with all the rights and estates, and subject to all the duties, liabilities, and responsibilities of the assignee so removed.[4]

[1] Gen Stat. (Rev. of 1875), p. 382, tit. 18, c. 11, § 15.
[2] Gen. Stat. (Rev. of 1875), p. 382, §§ 1 *et seq.*
[3] Pub. Stat. (1882), p. 657.
[4] Ibid. pp. 657, 658; see Earle v. Willard, 2 R. I. 517.

§ 380. In New Hampshire, the assignee is required, within ten days after the execution of the assignment, to file in the office of the register of probate of the county where the debtor resides, a copy of such assignment, a schedule of all the property embraced in it, and the estimated value thereof, and the incumbrances thereon, and a list of the names and residences of all the creditors of the debtor, and the amount and nature of their respective claims, verified by the oaths of the debtor and assignee to be true according to the best of their information, knowledge and belief.[1]

The assignee is also required to give to the judge of probate for the county a good and sufficient bond, with sureties, for the faithful performance and discharge of his duties, which bond shall be approved by the judge and filed in the probate office within five days after filing said schedule, unless the judge for good cause shall extend the time of filing the same, and shall inure for the benefit of the debtor and all his creditors, and may be prosecuted in the manner provided for administration bonds.[2]

If the assignee fail to file the copy of assignment, schedule and list of creditors within ten days, or such bond in five days, or within such further time as the judge may allow, he shall cease to be assignee, and the judge shall have the same jurisdiction to require a new bond and to remove any assignee, as is provided by law in the case of administrators.[3]

§ 381. In New York, the statutory provisions are as follows:[4]

A debtor making an assignment shall, at the date thereof or within twenty days thereafter, cause to be made and delivered to the county judge[5] of the county where such assignment is recorded, an inventory or schedule containing—

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[1] Gen. Stat. (ed. 1878), p. 336, c. 140, § 4.

[2] Gen. Stat. (ed. 1878), p. 336, c. 140, § 8.

[3] Id. ibid. § 7.

[4] Laws of 1877, c. 466, § 3, as amended by Laws 1878, c. 318; 3 R. S. (7th ed.) p. 2276.

[5] This includes the judges of the Court of Common Pleas in and for the city and county of New York. Matter of Morgan, 56 N. Y. 629.

1. The name, occupation, place of residence, and place of business, of such debtor.

2. The name and place of residence of the assignee.

3. A full and true account of all the creditors of such debtor, stating the last known place of residence of each, the sum owing to each, with the true cause and consideration therefor, and a full statement of any existing security for the payment of the same.

4. A full and true inventory of all such debtor's estate at the date of such assignment, both real and personal, in law and in equity, with the incumbrances existing thereon, and of all vouchers and securities relating thereto, and the nominal as well as actual value of the same according to the best knowledge of such debtor.

5. An affidavit made by such debtor, that the same is in all respects just and true. But in case such debtor shall omit, neglect or refuse to make and deliver such inventory or schedule within the twenty days required, the assignee named in such assignment shall, within thirty days after the date thereof, cause to be made, and delivered to the county judge of the county where such assignment is recorded, such inventory or schedule as above required, in so far as he can; and for such purpose said county judge shall, at any time, upon the application of such assignee, compel by order such delinquent debtor, and any other person, to appear before him and disclose, upon oath, any knowledge or information he may possess, necessary to the proper making of such inventory or schedule. The assignee shall verify the inventory and schedule so made by him, to the effect that the same is in all respects just and true to the best of his knowledge and belief. But in case the said assignee shall be unable to make and file such inventory or schedule within said thirty days, the county judge may, upon application upon oath, showing such inability, allow him such further time as shall be necessary, not exceeding sixty days. If the assignee fail to make and file such inventory or schedule within said thirty days, or such further time as may be allowed, the

county judge shall require, by order, the assignee forthwith to appear before him, and show cause why he should not be removed. Any person interested in the trust estate may apply for such order and demand such removal. The books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The county judge is authorized, by order, to require such debtor or assignee to allow such inspection or examination. Disobedience to such order is hereby declared to be a contempt; and obedience to such order may be enforced by attachment. The inventory or schedule shall be filed by said county judge in the office of the clerk of said county in which said assignment is recorded.[1]

The statute also empowers the county judge to require or allow any inventory or schedule filed to be corrected or amended, and to require and compel supplemental inventories or schedules to be made and filed.[2]

§ 382. Under the act of 1860,[3] previous to the amendment of 1874,[4] the making and delivery of the inventory and schedules within the time limited in the act, was essential to the validity of the assignment.[5] The act of 1874 provided that the omission to make or deliver the schedule should not invalidate the assignment. It has been held that it was the intent of that act to abrogate the rule first laid down in this section, and that the provision allowing the assignee six months to file schedules was not intended as a condition, the breach of which would invalidate the assignment.[6]

Under these statutes, when the inventory and schedule

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[1] See Pratt v. Stevens, 26 Hun, 229; Matter of Leahy, 5 Abb. N. C. 334; s. c. 8 Daly, 124; Re Croughwell, 17 N. B. R. 337.

[2] Laws of 1877, c. 466; amended by Laws of 1878, c. 318, § 2; 3 R. S. (7th ed.) p. 2278; see Mattison v. Demarest, 4 Robt. 161; Butt v. Peck, 1 Daly, 88.

[3] Laws of 1860, c. 348.

[4] Laws of 1874, c. 600.

[5] Juliand v. Rathbone, 39 N. Y. 369; rev'g s. c. 39 Barb. 97; Hardman v. Bowen, 39 N. Y. 196; see Fairchild v. Gwinne, 16 Abb. Pr. 23; s. c. 14 Id. 121; *contra*, Van Vleet v. Slauson, 45 Barb. 317; Evans v. Chapin, 12 Abb. Pr. 161; s. c. 20 How. Pr. 289: Barbour v. Everson, 16 Abb. Pr. 366; Read v. Worthington, 9 Bosw. 617.

[6] Produce Bank v. Morton, 67 N.Y. 199; s. c. 49 How. Pr. 277; 1 Abb. N. C. 174.

had been prepared and verified by the assignor and delivered to the judge and filed, they were to be regarded as part of the assignment, so far as they designated the creditors to be paid, and the amount of their debts.[1]

§ 383. By the fifth section of the act of 1877[2] it is provided as follows:

"The assignee named in any such assignment shall, within thirty days after the date thereof, and before he shall have any power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond to the people of the State of New York, in an amount to be ordered and directed by the county judge of the county where such assignment is recorded, with sufficient sureties to be approved of by such judge, and conditioned for the faithful discharge of the duties of such assignee, and for the due accounting for all moneys received by him, which bond shall be filed in the clerk's office of the county where such assignment is recorded; but in case the debtor shall fail to present such inventory within the twenty days required, then the assignee, before the ten days thereafter shall have elapsed, may apply to said county judge by verified petition for leave to file a provisional bond until such time as he may be able to present the schedule or inventory as hereinbefore provided."

The provision of the previous statute[3] was substantially the same, except that it required that the bond should be made within ten days after the delivery of the inventory and schedules, and it contained no provision in regard to a provisional bond.

It has been decided that the giving of the statutory security by the assignees, is not a condition precedent to the vesting of the estate in the trustees, nor does the failure to give the security within the time limited invalidate the trans-

[1] Terry v. Butler, 43 Barb. 395.

[2] Laws of 1877, c. 466; 3 R. S. (7th ed.) 2277.

[3] Laws of 1860, c. 348; amended by Laws of 1875, c. 56.

fer and restore the title of the assigned property to the assignors.[1]

An attempt on the part of the assignee to convey property before filing his bond is a nullity, and may be questioned and set aside, not only by the assignor's creditors, but by the assignee's successors;[2] but an inchoate right of property in the meantime vests in the assignee for the purposes of the trust.[3]

The statute[4] further provides that "A failure to file any bond required by or under this act or the acts hereby amended, within the specified time, will not deprive the county judge of his power over the assignee or the trust estate."[5]

The liability on the bond is for the discharge of the assignee's duties *under the assignment*, and not for his responsibility for the assigned property in case the assignment is set aside.[6]

The statute also provides for the prosecution of the assignee's bond,[7] and authorizes the county judge to require further security whenever in his judgment the security is not adequate.[8]

§ 384. In New Jersey, the assignee is required, immediately on assuming the trust, to exhibit to the surrogate of the county where the debtor resides, under oath or affimation, a true *inventory* and valuation of the debtor's estate,

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[1] Brennan v. Wilson, 71 N. Y. 502; s. c. 4 Abb. N. C. 279; Thrasher v. Bentley, 59 N. Y. 649; more fully in 1 Abb. N. C. 39; Syracuse, &c., R. Co. v. Collins, 59 N. Y. 649; s. c. 1 Abb. N. C. 47; Worthy v. Benham, 13 Hun, 176; Von Hein v. Elkus, 8 Id. 516; Hardman v. Bowen, 39 N. Y. 369; Van Vleet v. Slauson, 45 Barb. 317; Evans v. Chapin, 20 How. Pr. 289; Barbour v. Everson, 16 Abb. Pr. 366; Plume, &c., Co. v. Strauss, 17 Hun, 586; Sinclair v. Oakley, 6 N. Y. Weekly Dig. 513. The cases of Juliand v. Rathbone, 39 N. Y. 369; Hodges v. Bungay, 3 Hun, 594; and Fairchild v. Gwinne, 16 Abb. Pr. 366, are overruled by Brennan v. Wilson, *supra*, so far as they conflict therewith.

[2] Brennan v. Wilson, 71 N. Y. 502; s. c. 4 Abb. N. C. 279; Woodworth v. Seymour, 22 Hun, 245; 23 Id. 147.

[3] Von Hein v. Elkus, 8 Hun, 516; Bostwick v. Burnett, 74 N. Y. 317.

[4] Laws of 1877, c. 466, § 8; 3 R. S. (7th ed.) p. 2278.

[5] See Matter of Parker, 5 Abb. N. C. 334.

[6] People v. Chalmers, 1 Hun, 683; affi'd 60 N. Y. 154.

[7] Laws of 1877, c. 466, § 9; 3 R. S. (7th ed.) p. 2278. [8] Id. § 7.

so far as has come to his knowledge, and then and there to enter into *bond* to the ordinary of the State, in double the amount of the inventory and valuation, with sufficient security for the faithful performance of the trust. The bond, inventory, and valuation, are to be filed in the surrogate's office before the assignee can proceed to execute the trust.[1] The oath may now be taken before any foreign commissioner of deeds for New Jersey, or by any other officer qualified by the laws of this State to administer oaths and affirmations.[2]

In Pennsylvania, the assignees are required, within thirty days after the execution of the assignment, to file in the office of the prothonotary of the Court of Common Pleas of the county in which the assignor shall reside, an *inventory* or schedule of the estate or effects assigned, accompanied with an affidavit by the assignees that the same is a full and complete inventory of all such estate and effects, so far as the same has come to their knowledge.[3] *Appraisers* are then appointed by the Court of Common Pleas, or any judge thereof in vacation, who, having been first sworn or affirmed, are required to proceed forthwith to make an appraisement of the estate and effects assigned, and having completed the same, to return the inventory and appraisement to the court, where it is filed of record.[4] As soon as such inventory and appraisement have been filed, the assignees are required to give a *bond* or bonds, with at least two sureties, to be approved by one of the judges of the court, in double the amount of the appraised value of the estate assigned.[5] The statute prescribes the form of the

[1] Rev. Stat. (ed. 1878), p. 87, § 8; see Laws of 1876, c. 160; see In Re Stelle, 34 N. J. Eq. 199; See v. Zabriskie, 28 N. J. Eq. 422.

[2] Laws of 1879, c. 49.

[3] Purdon's Dig. (Brightley, 10th ed.) p. 92, pl. 9; see Reigart's Appeal, 4 Penn. St. 479; Baldwin v. Patton, 10 Watts, 60.

[4] Purdon's Dig. (Brightley, 10th ed.) p. 92, pl. 10, 11, 12.

[5] Ibid. pl. 13. A bond with single security is not void. Mears v. Commonwealth, 8 Watts, 283. But the giving of this bond is not a condition precedent; and a sale by the assignee without giving it is good. Dallam v. Fitler, 6 W. & S. 343; Heckman v. Messinger, 49 Penn. St 465. If he neglects to file an inven-

bond,[1] which is to be filed in the office of the prothonotary of the court, and to be entered by him of record, and is declared to inure to the use of all persons interested in the property assigned.[2]

§ 385. In Ohio,[3] the assignee, within ten days after the delivery of the assignment to him, and before disposing of the property so assigned, is required to enter into a bond payable to the State, in such sum and with such sureties as shall be approved by the court, conditioned for the faithful performance by said assignee of his duties according to law; and the court may require the assignee, or any trustee subsequently appointed, to execute an additional undertaking whenever the interests of the creditors of the assignor demand the same.

If the assignee fail for the ten days after the execution of the assignment to give the bond, the court must on the application of the assignor, or of any of his creditors, make an order removing such assignee and appointing a trustee in his place: provided, that if more than one assignee be named in the assignment and some of them fail as aforesaid, the court may permit the assignee or assignees complying with the law ("the preceding section") to qualify and enter upon the discharge of the duties of the trust.

The trustee must also give a bond within ten days after his appointment, or, failing so to do, he may be considered as declining the appointment, and the place may be filled by the court. Immediately upon the assignee or trustee giving

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tory or give bond, the remedy is to cite him before the court to show cause why he should not be dismissed. Id. Ibid. The assignee is answerable, though he has not given bond. Whitney's Appeal, 22 Penn. St. 500. The inventory is *prima facie* evidence of the amount of the assignee's liability. Assigned Estate of Truitt, 10 Phila. 16.

[1] Purdon's Dig. (Brightley, 10th ed.) p. 93, pl. 14.

[2] Ibid. pl. 14.

[3] R. S. of Ohio (1880), §§ 6335, 6336, 6340, 6347. Where a judge removes an assignee, and orders him to deliver to his successor the property and effects of the trust estate in his hands, and he fails to comply with the order, an action will lie upon the bond of the assignee, in favor of his successor, to recover the damages resulting from the failure to comply with such order. Phillips v. Ross, 36 Ohio St. 458.

bond the court must appoint three suitable disinterested persons appraisers of the property and assets of the assignor, and the assignee or trustee shall within thirty days after giving bond, unless for good cause shown the court shall allow a longer time, make and file in the court an inventory, verified by his oath, of the property, moneys, rights and credits of the assignor included in the assignment which have come to his possession or knowledge, together with an appraisement thereof by said appraisers under their oath.

§ 386. In Iowa, in addition to the schedule required to be annexed to the assignment, the assignee is directed forthwith to file with the clerk of the district or circuit court of the county where the assignment is recorded, a true and full inventory and valuation of the estate, under oath, so far as the same has come to his knowledge, and to then and there enter into bonds to the clerk for the use of the creditors, in double the amount of the inventory and valuation, with one or more sufficient sureties, to be approved by the clerk, for the faithful performance of the trust, and the assignee may thereupon proceed to perform any duty necessary to carry into effect the intention of said assignment.[1] But the assignment shall not be declared void for the want of any list or inventory.[2]

The assignee shall from time to time file with the clerk, an inventory and valuation of any additional property which may come into his hands under the assignment, after the filing of the first inventory, and the clerk may require him to give additional security.[3]

§ 387. In Indiana, the assignee is required,[4] within thirty

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[1] Code of Iowa (1880), p. 570, § 2118.

[2] Ibid. p. 571, § 2124. The failure of the assignee to file an inventory as required by the statute, does not render the assignment void. Price v. Parker, 11 Iowa, 144; Wooster v. Stanfield, 11 Iowa, 128. Before filing the inventory or bond, the assignee may bring an action of replevin to recover the assigned property. Price v. Parker, *ubi supra*. An imperfect or defective inventory cannot be treated as a nullity. Drain v. Mickel, 8 Iowa, 488.

[3] Code of Iowa (1880), p. 572, § 2125.

[4] Stat. of Ind. (G. & H. 1870), p. 115, § 6; R. S. (1881), § 2667.

days after entering upon the duties of his trust, to make and file, under oath, a full and complete inventory of all the property, real and personal, the rights, credits, interests, profits and collaterals which shall have come to his hands, or of which he may have obtained knowledge as belonging to the assignor. And it is further made his duty, whenever any property not mentioned in said inventory comes to his hands, or when he obtains satisfactory information of the existence of such property, to file an additional inventory of the same. Appraisers are then appointed, whose duty it then is to make an appraisal of the property, under oath.[1]

§ 388. In Missouri, it is made the duty of the assignee, within fifteen days after the execution of the assignment, to file in the office of the clerk of the circuit court of the county in which the assignor, or, if there be more than one, in which any one of them, shall reside (unless longer time be allowed by the judge of the court, for good cause shown), an *inventory* of the property and effects assigned, verified by his affidavit.[2] Appraisers are then appointed by the circuit court, or a judge or clerk thereof, in vacation, who, having first taken oath, proceed to appraise the property and effects inventoried,[3] and are required to file the appraisement in the office of the clerk of the circuit court within five days after completing it.[4]

The assignee, within three days after the filing of the assignment and the assignor's statement of the general nature and full value of the estate, is required to give *bond*, with at least two sufficient sureties, to be approved by the court, or judge, or clerk thereof in vacation, in double the amount of the estate and effects assigned, and if the appraised value of such estate and effects, when appraised, shall be greater than the value given in such statement, or if the securities in such bond should in any way become impaired or insufficient, the

[1] Stat. of Ind. (G. & H. 1876), p. 116, §§ 7, 8; R. S. (1881), § 2668.
[2] R. S. of Mo. (1879), §§ 355, 356.
[3] Id. §§ 357, 358. [4] Id. § 359.

assignee shall, at the time of filing the appraisement, give another bond, with at least two good and sufficient securities, to be approved by the court, or judge, or the clerk thereof in vacation, in double the amount of the appraised value of the estate and effects assigned.[1] The statute prescribes the form of the bond,[2] which is required to be filed in the office of the clerk of the court in which the inventory is filed, and to be recorded and presented, if taken in vacation, to the circuit court at the next regular term.[3] The court approve or reject the bond taken in vacation, and the approval or rejection is to be entered on record.[4] If the bond is rejected, the assignee is required to give a new bond within such time as the court may direct, not exceeding thirty days; and if he fail so to do, his authority to further act as assignee is to be deemed revoked.[5] The first bond is to be valid until the new one is given, notwithstanding its rejection, and the new one, when approved, relates back, and is operative from the date of the assignment.[6] Any person injured by breach of the condition of the bond may sue thereon in the name of the State, for his use.[7] If the assignee neglects to file an inventory or give bond as required, he may be cited to show cause why he should not be dismissed.[8]

The statutory provisions in Kansas,[9] are similar to those in Missouri, except that in the former State the assignee has thirty days after the execution of the assignment, in which to file his inventory.

§ 389. In Maryland, every trustee to whom any estate, real, personal or mixed, is limited or conveyed for the benefit of creditors, is required to file with the clerk of the court in which the deed or instrument creating the trust is recorded,

[1] R. S. of Mo. (1879), § 362. [2] Id. § 363.
[3] Id. § 364. [4] Id. § 365.
[5] Id. § 366. [6] Id. § 367. [7] Id. § 368.
[8] Id. § 381. But the failure of the assignee to give bond, or perform any other duty imposed upon him by statute, does not affect the rights of the creditors under the assignment. Hardcastle v. Fisher, 24 Mo. 70.
[9] Comp. L. (Dassler, 1881), pp. 99, 100; see § 22, *ante*.

a bond in such a penalty as the clerk may prescribe, being, as nearly as can be ascertained, double the amount of the trust estate, with sureties to be approved by the clerk, conditioned for the faithful performance of the trust; and it is further provided that no title shall pass to any trustee until such bond shall be filed and approved, and no sale made by any such trustee without such bond shall be valid or pass any title to such property or estate.[1]

If the trustee fail or refuse to give the bond for three months after the assignment is recorded, he may be removed and a new trustee appointed.[2]

§ 390. In California, the provisions of the civil code in reference to inventory and bond to be given and filed by the assignee, are substantially the same as those of the New York act of 1860,[3] and it is also provided that until the inventory and affidavit have been given, and the bond filed, the assignee has no authority to dispose of the estate, or convert it to the purposes of the trust.[4]

By an amendment of 1875, it is declared that the assignment is void against creditors of the assignor, and against purchasers and incumbrancers in good faith and for value, unless it is recorded, and unless the inventory is filed within twenty days after the date of the assignment.[5]

For the statutes of Arkansas and Oregon on these points, see sections 15 and 29*a* of this work.

In Michigan,[6] the filing of an inventory and bond in the office of the clerk of the circuit court of the county where the assignor resides, within ten days after the making of the assignment, is among the requisites, without which the assignment will be void. The assignment conveys "all property of the assignor not exempt from execution, and all

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[1] Law of Md. 1874, c. 483, § 107.

[2] Id. §§ 109, 110.

[3] See *ante*, p. 575; see Civil Code, §§ 3461, 3462, 3467; Hitt. §§ 3461, 3462, 3467.

[4] Ibid. § 3468; Hitt. § 3468.

[5] Amendments to Civil Code, § 3465; Hittell, vol. III, Supplement, § 3645.

[6] Laws of 1879, c. 198; Laws of 1881, c. 278.

rights, legal or equitable, of said assignors. *Provided*, That no such assignment shall be effectual to convey the title to the property of the assignor to the assignee until such bond shall be executed, filed with and approved by said clerk. *And provided further*, That no attachment or execution levied upon any assigned property of such assignor, after such assignment, and before the expiration of the time provided herein for filing such bond, shall be valid or create any lien upon such property." Such inventory shall be a detailed statement as near as may be, of the general description, value, and location of all the property and rights assigned. Such bond shall be to the assignor for the joint and several use and benefit of himself, and each, any, and all of such creditors of such assignor, in the penal sum of at least double the value of the assigned property, as shown by such inventory, and shall be conditional for the prompt and faithful administration of the trust by the assignee, and be signed by the assignee, and sufficient sureties, which sureties shall justify their responsibility before such clerk, or a circuit court commissioner, under oath, and shall testify that they are worth in the aggregate, over and above all exemptions and incumbrances and debts, the penal sum of said bond, and which justification shall be indorsed on said bond.

In Minnesota,[1] the debtor must, within ten days after making the assignment, make and file with the clerk of the district court an inventory, and before any assignee shall have power or authority to sell, dispose of, or convert to the purposes of the trust any part of such estate, and not later than five days after the filing of the inventory, he must execute and file with the clerk of the court a bond to the State to be approved by the judge of the district court with two or more sureties, freeholders and residents of the State, in an amount at least double the value of the estate assigned.

[1] Stat. of Minn. (1878), pp. 544, 545. The requirement as to filing a bond is imperative, and the assignee's interest in the property ceases if he fails to file the bond within the time prescribed. Kingman v. Barton, 24 Minn. 295.

The judge may in his discretion require new or additional bonds.

In Nebraska,[1] the assignees within thirty days after the execution of the assignment must file in the office of the clerk of the district court, in the county in which the assignor resides, an inventory of all the estate or effects assigned, accompanied with an affidavit by such assignees that the same is a full and complete inventory of all such estate and effects, so far as the same has come to their knowledge. The court or a judge thereof in vacation, on the application of the assignee, must appoint three appraisers. The assignee, as soon as the inventory and appraisement shall have been filed, must give a bond to the State in a prescribed form. The bond must be filed in the office of the clerk of the court, and must be entered on the journal and record of said court, and will inure to the use of all persons interested in the property assigned.

In Tennessee, the assignee must give a bond, with two or more good and sufficient sureties, in an amount equal to the value of the property mentioned in the assignment, payable to the State, and conditioned in a prescribed manner. He must also take oath that he will faithfully perform his duties, make an inventory, and return an account.[2] It has been held that an assignment is not rendered invalid by a clause therein waiving a bond from the trustee;[3] and the conveyance is valid to pass the title to the property without the bond.[4]

In Texas[5] the assignee forthwith after the execution and delivery of the assignment must execute a bond with securities to the State. It must be filed with the county clerk and will inure to the benefit of the assignor and creditors who may sue on it in their own names, jointly or severally.

[1] Comp. Stat. (1881), p. 61.

[2] Stats. of Tenn. (1871), § 1974.

[3] Whitworth v. Patterson, 6 Lea (Tenn.), 119.

[4] Mills v. Haines, 3 Head, 335; Vance v. Smith, 2 Heisk. 343; Williams v. Gideon, 7 Id. 617; Edmonson v. Harris, 2 Tenn. Ch. (Cooper), 435.

[5] Acts of 1879, c. 53, p. 57; R. S. (1879), Appendix, p. 6, § 6.

Upon the filing of the bond the assignee shall take possession of the assigned property and proceed to execute the assignment.

In Wisconsin the assignee, before taking upon himself the trust, must deliver a bond to the county clerk as obligee, in a sum not less than the whole amount of the nominal value of the assets. The bond must have two or more sufficient sureties, freeholders of that State. It must be filed, immediately after its execution, in the office of the county clerk to whom it is executed.[1]

Within ten days after the execution of the assignment, the assignor shall also make and file in the office of said clerk a correct inventory of his assets and a list of his creditors, stating the place of residence of each such creditor and the amount due to each, which inventory and list shall be verified by his oath and have affixed a certificate of the assignee that the same is correct, according to his best knowledge and belief; and a failure to make and file such inventory and list shall render such assignment void, but no mistake therein shall invalidate such assignment or affect the right of any creditor.[2] The word "mistake" includes mistakes of law.[3]

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[1] R. S. of Wis. (1878), §§ 1694, 1695; see Boland v. Benson, 50 Wis. 225; and cases cited under § 33*a*, *ante*.

[2] Id. § 1697.

[3] Farwell v. Gundry, 52 Wis. 268.

CHAPTER XXXII.

RIGHTS, DUTIES AND POWERS OF THE ASSIGNEE.

The rights and powers with which the assignee becomes invested by the assignment, and the duties to which it subjects him, have already been generally noticed. In the present chapter they will be considered more particularly.

§ 391. *How the Assignee Takes.*—Under this head, it may be said generally that the assignee succeeds only to the rights of the assignor,[1] and is affected by all the equities against him,[2] and that he takes the property subject to all equities.[3] He takes subject to all existing liens,[4] charges

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[1] Luckenbach v. Brickenstein, 5 W. & S. 145; German Savings Institution v. Adae, 8 Fed. Reptr. 106; Hodgson v. Barrett, 33 Ohio St. 63; James v. Mechanics' Nat. Bank, 12 R. I. 490; Morris's Appeal, 88 Penn. St. 368.

In California, it is provided by the Civil Code (§ 3460; Hitt. § 8460), that an assignee for the benefit of creditors is not to be regarded as a purchaser for value, and has no greater rights than the assignor had in respect to things in action transferred by the assignment.

In Lycoming Ins. Co. v. Storrs (97 Penn. St. 354), an action was brought by an assignee for the benefit of creditors, upon a policy of insurance issued to his assignor. The defense was that the plaintiff's assignor had failed to pay premiums in accordance with the terms of the policy, after notice. It was held to be no answer for the assignee to show that he agreed with the agent of the company after the assignment, that such notice should be given to him, and that this agreement was not complied with. The assignee never stood in any contract relation with the company, and it is therefore wholly immaterial what agreement he made with the agent.

[2] Moody v. Litton, 2 Ired. Eq. 382; Frow v. Downman, 11 Ala. 880.

[3] Leger v. Bonaffe, 2 Barb. S C. 475; Addison v. Burckmyer, 4 Sandf. Ch. 498; Reed v. Sands, 37 Barb, 185; Van Heuson v. Radcliffe, 17 N. Y. 580; O'Hara v. Jones, 46 Ill. 288; Willis v. Henderson, 4 Scam. 13; Stow v. Yarwood, 20 Ill. 497; Goodwin v. Mix, 38 Ill. 115; Mellon's Appeal, 32 Penn. St. 121; Plunkett v. Carew, 1 Hill Ch. (S. Ca.) 169; Thorpe v. Dunlap, 4 Heisk. (Tenn.) 674; Warren v. Fenn, 28 Barb. 333; Maas v. Goodman, 2 Hilt. (N. Y.) 275; Arnold v. Grimes, 2 Iowa, 1; Griffin v. Marquardt. 17 N. Y. 28; Corn v. Saus, 8 Metc. (Ky.) 391; Roberts v. Corbin, 26 Iowa, 315; Williams v. Winsor, 12 R. I. 9.

Thus where the plaintiff, by mistake of fact, sent to a New York bank, to be credited to the defendant, more money than was due the latter and the defendant assigned, it was held that the plaintiff could recover against the assignee, who took the assets subject to the equities existing against them in the hands of the defendant. First Nat. Bank v. Mastin Bank, 2 McCrary, 438.

Hence, also, it is held, that an assignee under a voluntary deed of trust, made to him *pendente lite*, cannot be admitted as a party. Stockett v. Goodman, 47 Md. 54.

[4] Corning v. White, 2 Paige, 567; Haggerty v. Palmer, 6 Johns. Ch. 437;

and set-offs. Thus, he takes the property subject to the lien of a creditor which has attached by the filing of a bill before the assignment.[1] He takes debts and choses in action subject to the right of set-off in the debtors.[2] He takes interests of devisees in land subject to legacies charged upon them.[3] He takes buildings subject to liens for materials.[4] And he takes deposits in bank subject to any lien of the bank existing at the time of the assignment.[5] He takes real estate,[6] and personal property,[7] subject to the equitable lien of the vendor for purchase money.

Real estate in the hands of the assignee is not exempt from the payment of taxes, whether assessed thereon before or after the assignment was made. Personal property remaining on the land thus taxed, after the assignment, is liable to distress for the non-payment of the taxes.[8] But the assignee cannot be compelled to pay the taxes which accrued after the assignment, on land mortgaged by the assignor prior thereto on the petition of the mortgagees, there being no provision in the assignment authorizing such payment.[9]

Walker v. Miller, 11 Ala. 1076; Tibbetts v. Weaver, 5 Strobh. 144; Barnes v. Fisher, 9 Mo. App. 574; Eames v. Mayo, 6 Ill. App. (Bradw.) 334; City Bank v. Sherlock, 16 N. B. R. 62; see Hathaway v. Fall River Nat. Bank, 131 Mass. 14.

[1] Corning v. White, 2 Paige, 567. The lien of an execution in the hands of a constable holds good against a subsequent assignment under the general assignment law. Frost v. Wilson, 70 Mo. 664; Griffin v. Wallace, 66 Ind. 410.

Where property has been levied on under an execution, and the owner assigns, the assignee acquires title subject to the lien of the execution, which title is good against all persons until the assignment is impeached for fraud. Mumper v. Rushmore, 79 N. Y. 19.

[2] Fry v. Boyd, 3 Gratt. 73; see Ainslee v. Boynton, 2 Barb. S. C. 258. In Neal v. Lea (64 N. Ca. 678), it was held that a defendant could not offset to the claim of the plaintiff, as assignee of a note past due when assigned, by showing that the assignor was indebted to such defendant at the time of the assignment, unless such counter-claim had attached before the assignment, as by an agreement that it should be applied thereto or otherwise. Neal v. Lea, 64 N. Ca. 678; Connaughey v. Chambers, 64 Id. 284; Haywood v. McNair, 2 D. & B. 283; Wharton v. Hopkins, 11 Ired. 505. As to what debts can be set off, see *post*, § 403.

[3] Swoyer's Appeal, 5 Barr, 377.

[4] Twelves v. Williams, 3 Whart. 485.

[5] Beckwith v. Union Bank, 4 Sandf. S. C. 604; affi'd 9 N. Y. 211.

[6] Corn v. Saus, 3 Metc. (Ky.) 391; Thorpe v. Dunlap, 4 Heisk. (Tenn.) 674.

[7] Warner v. Jameson, 52 Iowa, 70.

[8] Wright v. Wigton, 84 Penn. St. 163.

[9] Matter of Lewis, 81 N. Y. 421.

Sometimes a different rule is established by statute. Thus, in Connecticut, under the act of 1853, the assigned property vests at once in the trustee, free from all attachments made within sixty days preceding the execution of the assignment, all such attachments being declared by the statute to be dissolved.[1]

In the case of Dey v. Dunham,[2] in the Court of Chancery in New York, it was held that a general assignee in trust for creditors was to be considered as a *bona fide* purchaser as against a prior unrecorded mortgage, he not having had due notice of such mortgage.[3]

But in a later case,[4] in the same State, where a debtor had executed a chattel mortgage upon certain furniture as security for rent, but the mortgage was unrecorded, and the debtor subsequently executed a general assignment of all his property—it was held that the assignee was not a purchaser in good faith within the meaning of the act requiring chattel mortgages to be filed, and that he could not hold the proceeds of the furniture against the assignee of the lease.

In Ohio,[5] where a mortgagee in possession under a chattel mortgage makes an assignment, and the assignee proceeds in the probate court to administer the trust according to the statutes, the mortgagee cannot maintain an action against the assignee for converting the property to his own use. The mortgagor's interest, where the assignee is clothed with

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[1] Gen. Stat. (Rev. of 1875), p. 393, tit. 18, c. 11, § 12. But if the property is subsequently taken from the trustee, so that it cannot be used for the benefit of the creditors of the estate, the attachments and levies revive. But this section applies only to proceedings pending at the time of assignment, and not to such as are completed. Palmer v. Woodward, 28 Conn. 248. The title of the assignee relates back to the time of the institution of proceedings. Adams v. Lewis, 31 Conn. 501; see Boughton v. Crosby, 47 Id. 577; Von Wettberg v. Carson, 44 Id. 287.

[2] 2 Johns. Ch. 188; reversed on other grounds, in 15 Johns. 555.

[3] This was a case of deed with defeasance, the deed only being recorded.

[4] Van Heusen v. Radcliff, 17 N. Y. 580, Denio, J., discussing Dey v. Dunham, *supra*; Haggerty v. Palmer, 6 Johns. Ch. 437; Slade v. Van Vechten, 11 Paige, 21; see Re Collins, 12 N. B. R. 379; Platt v. Stewart, 13 Blatch. 481; Barker v. Smith, 12 N. B. R. 274; Wilkins v. Davis, 15 Id. 60.

[5] Lindemann v. Ingham, 36 Ohio St. 1; Ingham v. Lindemann, 37 Id. 288. (These cases were under the act of 1859.)

authority to sell the goods, is transferred to the fund arising from the sale; and this will be true though the condition in the mortgage was broken at the time of the assignment. Under the statute the mortgagee not having possession, the mortgage is void as against creditors. The assignee takes the property under the assignment, and holds it for the exclusive benefit of creditors. Their rights can be as effectually asserted through an assignee for their benefit as by judgment and execution against the property, and therefore he can sell the property covered by the mortgage, and is not confined to a sale of the equity of redemption.[1]

But in Minnesota,[2] where a mortgage of personal property was valid between the parties to it, it was held that the legal title as between them passed to the mortgagee, leaving only a right of redemption in the mortgagor, which was all that passed to his assignee, the latter not being a purchaser for a valuable consideration, so as to be able to avoid the fraudulent mortgage.

The rule seems to be the same in Michigan.[3] In Missouri, assignees have been treated as *bona fide* purchasers for a valuable consideration.[4] And the same rule appears to prevail in Virginia and West Virginia.[5]

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[1] Hanes v. Tiffany, 25 Ohio St. 546; Kilbourne v. Fay, 29 Id. 264, 279; Tully v. Nash, 8 Am. L. Rec. 419.

[2] Mann v. Flower, 25 Minn. 500; Flower v. Cornish, Id. 473; Bennett v. Ellison, 28 Id. 242.

[3] Wakeman v. Barrows, 41 Mich. 363; see Putnam v. Reynolds, 44 Id. 113. In Hawks v. Pritzlaff (51 Wis. 160), it was held that the assignee could not bring an action for conversion against the chattel mortgagee of his assignor on the ground that the mortgage had not been filed, since the assignor could not do so.

[4] Gates v. Labeaume, 19 Mo. 17; First Nat. Bank v. Hughes, 10 Mo. App. 7; Lionberger v. Broadway Savings Bank, Id. 499, 509; see Wise v. Wimer, 23 Id. 237; Hardcastle v. Fisher, 24 Id. 70.

The assignee does not represent the creditors, and cannot, on their behalf, dispute a conveyance of the assignor, good *inter partes*, as being in fraud of creditors. This was true at common law, and has not been changed by the Missouri statute. Heinrichs v. Woods, 7 Mo. App. 236; Haenssler v. Teichman, 9 Id. 594. But it has also been held that the assignees of an insolvent banking corporation may maintain an action against a director for damages for loss to the bank occasioned by the fraudulent sale to the bank of its own stock by such director. The transaction was bad *inter partes*. Shultz v. Christman, 5 Mo. App. 338.

[5] Evans v. Greenhow, 15 Gratt. 153; Exchange Bank v. Knox, 19 Gratt. 789; Harrison v. Farmers' Bank, 9 W. Va. 424.

In the case of Wickham v. Martin (13 Gratt. 427), it was held that where an

So in Michigan, in the case of Hollister v. Loud,[1] an assignee was held by the Supreme Court to be, in legal contemplation, a purchaser for a valuable consideration.[2] But in the later case of Pierson v. Manning,[3] in the same court, the doctrine was denounced as "an absurdity."[4] And the prevailing rule now is, that neither the assignee nor the creditors whom he represents are purchasers for a valuable consideration, without notice, as against prior equitable liens.[5] There must be some consideration passing at the time of the assignment, some new responsibility incurred, or some rights given up, to invest an assignee with this character.[6] Thus, in Massachusetts, a general assignment of a debtor's property, in trust for the payment of his debts, and containing a release of such debts by the creditors, was held not to constitute the assignees *bona fide* purchasers for a valuable consideration as against one having an equitable title to a portion of the property, unless it be shown that some new responsibility was incurred on the credit of the property, or that the creditors would not have become parties to the indenture if they had known that such portion of the property was held by the debtor in trust.[7]

An assignee "takes no better title and no higher rights

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insolvent merchant purchases goods, not intending to pay for them, and after getting possession of them he conveys them and all his other estate in trust for the payment of his debts, the trustee having no notice of the fraud, the trustee is a purchaser for value, without notice. See Belding v. Frankland, 8 Lea (Tenn.), 67.

[1] 2 Mich. 309.

[2] Wing, P. J., Id. 312, citing 2 Johns. Ch. 189; 10 Pick. 413; 2 Kent's Com. 533; Roberts on Fraud. Conv. 434; Gorham v. Reeves, 1 Smith (Ind.), 289.

[3] 2 Mich. 445. [4] Pratt, J., Id. 433.

[5] Haggerty v. Palmer, 6 Johns. Ch. 437; Knowles v. Lord, 4 Whart. 500; 2 Kent's Com. [532] 689, note; see Walker v. Miller, 11 Ala. 1067; Maas v. Goodman, 2 Hilt. (N. Y.) 275; Griffin v. Marquardt, 17 N. Y. 28; Reid v. Sands, 37 Barb. 185; Willis v. Henderson, 5 Ill. 13; Warner v. Jameson, 52 Iowa, 70; Bennett v. Ellison, 23 Minn. 242.

In Person v. Oberteuffer (59 How. Pr. 339), it was held that consignors of material had no lien for balance of account, under a running agreement, on property assigned by consignees and manufacturers to the defendant, in trust for the benefit of creditors. See Francklyn v. Sprague, 10 Hun, 589; Addison v. Bruckmeyer, 4 Sandf. 531.

[6] Frow v. Downman, 11 Ala. 880; Clark v. Flint, 22 Pick. 231.

[7] Clark v. Flint, 22 Pick. 231.

than the assignor had, and is not to be regarded as a purchaser for a valuable consideration without notice. If the assigned estate is subject to a trust, the assignee takes, subject to the rights of the equitable owner."[1]

And in New York it has been held, that where an execution is in the hands of the sheriff at the time of a general assignment of the property of the defendant in the execution, for the payment of his debts, the lien of the execution upon the personal property liable to seizure and sale thereon is paramount to the title of the general assignee, the latter not being a *bona fide* purchaser within the intent and meaning of the Revised Statutes, which protects the title of *bona fide* purchasers who have purchased between the delivery of the execution to the sheriff and an actual levy upon the property.[2]

§ 392. *Duties and Powers of Assignee.*—The principal duties which devolve upon the assignee by his acceptance of the trust are those marked out by the assignment itself, namely: to *take possession* of the property assigned, to convert it into money by the process of *collection* and *sale*, and to *distribute* the proceeds among the creditors entitled. The first of these duties has already been particularly considered.[3] The others will be treated of in like manner, under distinct heads.[4]

During the whole course of the trust, the assignee is bound to look primarily to the interests of the creditors whom he, in the first instance, represents.[5] He may confer with them for the purpose of obtaining their advice or assent to his proceedings.[6] He may avail himself of the assistance

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[1] Chace v. Chapin, 130 Mass. 128; see Hathaway v. Fall River Nat. Bank, 131 Id. 14.

[2] Slade v. Van Vechten, 11 Paige, 21.

[3] See Chap. XXX. [4] See Chaps. XXXV, XXXVI, XXXVIII.

[5] McLellan's Appeal, 26 Penn. St. 468; Clark v. Stanton, 24 Minn. 232. In Bullitt v. Methodist Ep. Church (Id. 108), it was held that a voluntary assignee of a limited partnership represents only the assignor, and not the creditors.

[6] In the case of Mussey v. Noyes (26 Vt. 462, 464), the assignees, immediately after taking possession of the property, had called a meeting of the creditors, at

of the assignor, but should not allow him to direct as to the management and disposal of the property.[1] He must be governed throughout by the terms and provisions of the deed, so far as they can be legally pursued.[2]

All the acts of trustees within the scope of their authority conferred by the deed, and within the duties imposed by law, bind the creditors, the debtor and themselves; unauthorized acts do not, and they may be required to account for the misapplication of the fund or omission of duty.[3]

And in New York[4] and other States[5] it has been expressly provided by statute that, "Where the trusts shall be expressed in the instrument creating the estate, every sale, conveyance or other act of the trustees in contravention of the trust shall be absolutely void." So where the assignees reconveyed certain of the trust property to the assignor before the payment of all the debts provided for in the assignment, and the assignor executed a mortgage of the property so reconveyed for a *bona fide* consideration, to a party without actual notice, in an action afterwards brought to set aside the mortgage and subject the property so reconveyed to the trust, it was held that the assignees had no power to reconvey before the execution of the trust, and could convey no title.[6]

By accepting the trust according to its terms, a creditor

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which the different modes of managing and disposing of the property were discussed, and under the advice so obtained they had acted. See also Forbes v. Scannell, 13 Cal. 242.

[1] Caldwell v. Williams, 1 Ind. 405, 407.

[2] Id. Ibid.; Page v. Olcott, 28 Vt. 469; Hulse v. Marshall, 7 Mo. App. 148; Matter of Lewis, 81 N. Y. 421. The duties and obligations of the assignee are created by the deed, and they can neither be enlarged, diminished, or varied by any arrangement between the *cestuis que trust* without his consent. Geisse v. Beall, 3 Wis. 367.

[3] Field v. Flanders, 40 Ill. 470.

[4] 1 Rev. Stat. 730, § 65; 3 R. S. (7th ed.) p. 2183.

[5] So in Indiana. 1 Rev. Stat. of Ind. (ed. 1870), p. 631, § 5; R. S. (1881), § 2973; see Hodgson v. Macey, 8 Ind. 122; Wright v. Bundy, 11 Id. 400; as to the duties in general of the trustee, see R. S. of Ind. (1881), §§ 2671, 2674.

An assignment under the statute should not be deemed to create any right in the assignee, or the creditors for whom he is trustee, which can exclude the equitable claims of others in their origin antedating the assignment. Davis v. Newcomb, 72 Ind. 413.

[6] Briggs v. Davis, 20 N. Y. 15, 21.

trustee waives all claims and liens upon the property inconsistent with the deed.[1] But it is said that the rule which prohibits a trustee from acquiring an interest adverse to his *cestui que trust* does not apply to a *bona fide* creditor who has become trustee; and that such trustee may purchase a judgment against his *cestui que trust*.[2] In the process of collection, sale, and distribution, he is bound to use all reasonable dispatch.[3] And in general, he is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it.[4]

§ 393. *Custody of Property.*—An important part of the assignee's duties relates to the custody and management of the property, before its sale and final distribution. Until a sale can be effected, it is his duty to preserve and protect it, so that it may be disposed of to the best advantage; and he has the necessary power and discretion for this purpose.[5] Thus he may effect and continue necessary insurance,[6] may pay interest on mortgages which are prior liens upon the assigned property,[7] and may sometimes pay off the mortgages themselves. In New Jersey the power to redeem mortgages is expressly given to assignees by statute.[8] In Pennsylvania, it has been held that he may elect or refuse to take a lease of real estate held by the assignors at the time of the assignment, without interfering with the right to the other property assigned.[9] But he cannot im-

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[1] Harrison v. Mock, 10 Ala. 185.

[2] Prevost v. Gratz, Peters' C. C. 373.

[3] Paige v. Olcott, 28 Vt. 469. This is made the subject of express provision, by the Vermont act of December 19, 1852, § 5.

[4] Bellamy v. Bellamy's Adm'r, 6 Fla. 62; Hamilton v. Wright, 1 Bell's (Scotch) Appeal Cas. 574; see Matter of Marquand, 57 How. Pr. 477.

[5] Morton, J., in Woodward v. Marshall, 22 Pick. 474. See the observations of Sandford, J., in Litchfield v. White, 3 Sandf. S. C. 545, 551. Nor can he delegate his duties under the assignment, to a stranger. Small v. Ludlow, 1 Hilt. (N. Y.) 189. As to his power to convey by attorney, see *post*, Chap. XXXV.

[6] Harris, J., in Whitney v. Krows, 11 Barb. 198, 201, 202.

[7] Id. ibid.

[8] Rev. Stat. (ed. 1878), p. 39, § 13.

[9] Pratt v. Levan, 1 Miles, 358.

prove real estate by erecting buildings, or do any other act tending to delay creditors.[1] Where the property assigned is growing crops, he may employ the necessary assistance to harvest and secure them.[2]

In regard to personal property, the assignee has a similar power and discretion. If it be perishable, he is bound to resort to the proper means for its preservation, until it can be advantageously disposed of. If there be no opportunity to sell, it must be taken care of till a favorable change in the market occurs.[3] And if it be unsalable, he may complete and prepare it for market,[4] as will be more particularly shown under another head.[5] In New Jersey, by statute, he has power to redeem conditional contracts.[6]

§ 394. *Powers in General.*—The assignee is clothed with all the necessary *powers* to obtain possession of the property assigned, and to collect the debts by process of law; and in some States he may avoid a previous fraudulent assignment.[7]

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[1] Hitchcock v. Cadmus, 2 Barb. S. C. 381; Hurlbut, J., Id. 383, 385.

[2] Harris, J., in Whitney v. Krows, 11 Barb. 202.

[3] This, of course, is subject to the general rule against delaying sales, hereinafter noticed.

[4] Morton, J., in Woodward v. Marshall, 22 Pick. 474.

[5] See *post*, Chap. XXXIII. [6] Rev. Stat. (ed. 1878), p. 39, § 13.

[7] Van Heusen v. Radcliffe, 17 N. Y. 580; Englebert v. Blanjot, 2 Whart. 240; overruling, as to this point, the case of Thompson v. Dougherty, 12 S. & R. 448; and see Brownell v. Curtis, 10 Paige, 210, 211; see the New York act of April 17, 1858.

The assignee may set aside a fraudulent conveyance of his assignor. Pillsbury v. Kingon, 33 N. J. Eq. 287 (cited under the next section).

The assignee may rightfully pay over to a person from whom the assignor had fraudulently obtained property, the proceeds of sales of such property; and a bill in equity will not lie to compel him to pay such proceeds to the preferred creditors. Doyle v. Peckham, 9 R. I. 21.

In Pennsylvania the assignee stands in the shoes of the assignor as to all transactions before the assignment. He cannot set up the fraud of his assignor in any previous transfer or judgment. He does not represent the creditors, who may have superior claims, and he is not armed with their powers. But he can assert his and their right to any property of the assignor, which passed by the assignment against any person claiming by subsequent transfer, attachment, judgment, execution or any other lien. Marks' Appeal, 85 Penn. St. 231.

In Thomas v. Penrich (28 Ohio St. 55), it was held that an assignee of a firm may maintain an action to recover the amount of firm funds applied by one partner, without the assent of his copartner, in payment of his private debt, against a person receiving such funds.

He may attack the validity of a judgment entered upon the confession of his assignor,[1] and he may contest for the benefit of creditors the claims of a mortgagee under a defective mortgage, to a preference in the distribution of the proceeds.[2]

But a general assignment by a person who is a member of a partnership, gives to his assignee no control over the partnership funds or claims, so as to enable him to receive or release them.[3] And an assignee has no power to convey the estate assigned, for any other purpose than the benefit of creditors, so long as the trust remains undischarged.[4]

As incident to his general powers, the assignee has power to appoint and employ all necessary *clerks* and *agents*, to assist him in the performance of his duties; and to allow and pay them suitable compensation for their services.[5]

§ 395. The powers of an assignee are sometimes expressly defined by statute. Thus, in New Jersey, it is declared that every assignee shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment; and to sue for and recover, in the proper name of the assignee, everything belonging or appertaining to the estate, real or personal, of the debtor; and shall have full power and authority to refer to arbitration, settle and compound, and to agree with any person concerning the same; and to redeem all mortgages and conditional contracts, and generally to act and do whatsoever the debtor might have lawfully done

[1] Nichols v. Kribs, 10 Wis. 79.

[2] The Sixth Ward Building Assoc. v. Willson, 41 Md. 506.

[3] Moddewell v. Keever, 8 W. & S. 63.

[4] Briggs v. Palmer, 20 Barb. 392, 404; Briggs v. Davis, 21 N. Y. 574; s. c. 20 N. Y. 15.

[5] Vernon v. Morton, 8 Dana, 247; see *ante*, p. 334. In a head note to Cannon v. Kelly, 5 Hun, 283, it is said that an assignee for the benefit of creditors, has no right to employ clerks to sell a stock of goods assigned to him, at retail, in the usual course of business.

in the premises.[1] In New York it has been declared by statute, that any assignee or other trustee of the property and effects of an insolvent estate, corporation, association, partnership or individual, may, for the benefit of creditors, disaffirm, treat as void, and resist all acts done, transfers and agreements made, in fraud of the rights of any creditors, including themselves, and others interested in any estate or property held by, or of right belonging to, any such trustee or estate.[2] And that every person who shall, in fraud of the rights of creditors and others, have received, taken, or in any manner interfered with the estate, property, or effects of any insolvent corporation, association, partnership or individual, shall be liable in the proper action, to the trustees of such estate or property for the same, or the value of any property or effects so received or taken, and for all damages caused by such acts to any such trust estate.[3]

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[1] Rev. Stat. (1878), p. 89, § 13. In Van Keuren v. McLaughlin (21 N. J. Eq. 163), where it was ascertained that a previous absolute conveyance by the assignor was, in fact, a mortgage, and that a certain other absolute conveyance executed by the assignor, was fraudulent against creditors, it was held that the equity of redemption in the mortgaged premises passed to the assignee, but not so as to the property conveyed in fraud of creditors.

But this case has been overruled in Pillsbury v. Kingon 33 N. J. Eq. 287; reversing s. c. 31 Id. 619. The assignment in this case was under the statute. Previously the debtor had conveyed away property in fraud of creditors. The latter had presented their claims for allowance and the property was insufficient to pay them in full, without resorting to the property fraudulently conveyed away. It was held that the assignee has standing in court to set aside the fraudulent conveyance, and can reach the property thus conveyed away, for the purpose of applying it in satisfaction of the claims of creditors. (See numerous cases cited and reporter's note.)

[2] Act of April 17, 1858, § 1; Laws of 1858, c. 314, p. 506; 3 Rev. Stat. (7th ed.) p. 2330, § 1.

[3] Id. § 2.

Under this act the assignee has ample power, and no doubt it is his duty to attack any conveyance made in fraud of creditors, and to reach the property fraudulently disposed of or concealed. Miller v. Halsey, 4 Abb. Pr. N. S. 28, 33.

In McMahon v. Allen (35 N. Y. 404; more fully 32 How. Pr. 313; reversing 34 Barb. 56; 12 Abb. Pr. 275), a transfer of property, real and personal, was obtained, fraudulently and inequitably, by false representations made by the transferee to the transferrer, by abuse of a fiduciary relationship. The transferrer subsequently made a conveyance of all his property and causes of action to an assignee, for the benefit of his creditors. The question was, whether the assignee could maintain an action to set aside the previous conveyance, as having been fraudulently and inequitably obtained, and by an abuse of fiduciary relationship. It was held that the action could be maintained. The conveyances, however, were made previous to the Act of 1858. The decision was placed upon the ground of imposition and fraud upon the assignor, and not of fraud against

In Maine, the assignee is empowered to recover, collect, and apply for the benefit of creditors, all property conveyed or transferred by the assignor, previous to and in contemplation of the assignment, with the design to defeat, delay or defraud creditors, or to give a preference to one creditor over another.[1]

So in Iowa, it is provided that any assignee shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover in the name of such assignee, everything belonging or appertaining to said estate, and generally to do whatsoever the debtor might have done in the premises.[2]

In Connecticut, it has been held that under the act of 1853, a trustee in insolvency is the agent of the creditors of the insolvent, as well as of the law. He is the instrument by which, instead of by attachment, the property of the debtor is secured for their benefit, and any conveyance which would have been deemed fraudulent and void as against attaching creditors, is equally void as against him.[3]

In Minnesota,[4] the assignee represents creditors, as against all transfers and conveyances of property which would be held to be fraudulent or void as to creditors, and has all the

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creditors. The cases relied upon were Dickinson v. Burrill, L. R. 1 Eq. 337; Oneida Bank v. Ontario Bank, 21 N. Y. 490; Tracy v. Talmage, 14 Id. 192; Waldron v. Willard, 17 Id. 466; see In re Ward, 1 Am. Insol. R. 339.

In Ball v. Slafter, 26 Hun, 353, it was held that a chattel mortgage, fraudulent as to creditors, one of whom the mortgagor had made his assignee, was void under the law of 1858, as against such assignee; and the right given by that statute to invalidate a transfer of property, extends only to defects based upon fraud or fraudulent intent. Matter of Collins, 12 Blatch. 548; Southard v. Benner, 72 N. Y. 424, 428; see Leonard v. Clinton, 26 Hun, 288; Halsted v. Halsted, 55 N. Y. 442, 445; Hard v. Milligan, 8 Abb. N. C. 58, 65; and § 110, *ante*.

[1] Rev. Stat. (ed. 1871), p. 545, c. 70, § 8; see *ante*, p. 32. An assignee may maintain a bill to recover property conveyed by the debtor with intent to defeat, delay or defraud creditors, however defective the description, or however inapplicable to the property, the terms may be. Simpson v. Warren, 55 Me. 18.

[2] Iowa Code (1880), § 2127.

[3] Gen. Stat. (Rev. of 1875), p. 378; see Shipman v. Ætna Ins. Co. 29 Conn. 245; Robertson v. Todd, 31 Id. 555; Thomas v. Beck, 39 Id. 241; Croswell v. Allis, 25 Id. 301; Palmer v. Thayer, 28 Id. 257; Calhoun v. Richards, 30 Id. 210; Taylor v. Atwood, 47 Id. 448; Shaw v. Smith, 44 Id. 306.

[4] Stat. of Minn. (1878), p. 545.

rights which such creditors would have to avoid such fraudulent conveyances and transfers.

And in Michigan,[1] Minnesota,[2] and some other States, it is provided by statute that every beneficial power, and the interest of every person entitled to compel the execution of a trust power, shall pass to the assignee of the estate and effects of the person in whom such power or interest is vested, under any general assignment of the estate and effect of such person for the benefit of creditors, made pursuant to law.

The powers of surviving and substituted assignees, and the liability of assignees in general, will be considered hereafter, under distinct heads.

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[1] Compiled Laws (1871), p. 1337, § 4172.

[2] 1 Stat. at Large (Bissell), p. 511; R. S. (1878), p. 558.

CHAPTER XXXIII.

TO WHAT EXTENT THE ASSIGNOR'S BUSINESS MAY BE CONTINUED BY THE ASSIGNEE.

§ 396. As a general rule, the effect of a general assignment of a debtor's property is to put an end to the transaction of his business, as ordinarily conducted, and to the ordinary operations of purchase, manufacture and sale. But this, as we have seen, is sometimes qualified by stipulations in the instrument of assignment, providing for the continuation of the business for a limited time, with a view to the more beneficial execution of the trust. The cases in which stipulations of this kind have been sustained, were considered under a previous head.[1]

Independently, however, of any authority contained in the assignment, the assignee may, in certain cases, continue the business as it has been conducted by the debtor. Thus, where an assignor is conducting a manufacturing business when he makes an assignment, and he has a large amount of material on hand for the purpose of being manufactured, the assignee can conduct the business in his own name, for the purpose of working up the material thus ready for manufacture, where it is manifestly for the benefit of the estate.[2] In the case of Woodward v. Marshall,[3] in the Supreme Court of Massachusetts, it was observed by the court (Morton, J.), that an authority for this purpose would be implied by law, as necessarily incident to the principal powers granted to the assignee. "Where the estates of insolvent men," it was said, "are liable to be transferred, and that too, generally, without much discretion in the selection

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[1] See *ante*, pp. 227 *et seq.*

[2] Patten's Estate, 2 Pars. (Penn.) Select Eq. Cas. 108; Miller v. Mulford, 31 N. J. Eq. 661.

[3] 22 Pick. 468.

of a propitious opportunity, it will necessarily happen that property of all kinds, and in every stage of preparation for market, will come into the hands of assignees; and unless they exercise the power of preparing it for market, it will often perish or be sacrificed. Of the propriety and expediency of the measures to be adopted, they must judge in the first instance. Whether they abuse their trust or not, may be inquired into, in a proper form of action."[1]

§ 397. So, the assignee may continue the business, with the express assent or approval of the creditors. In the Vermont case of Mussey v. Noyes,[2] in which the assignment was sustained, the assignees, after taking possession of the property named in the assignment, continued to run a paper mill, for the purpose of working up the paper mill stock then on hand, and also purchased some stock which they worked, which was not necessary for working off that on hand. But this was done with the assent and by the advice of the creditors, who had been called together for the purpose.[3]

But the assignee cannot continue the business longer than is necessary for the special purpose of working up the material on hand. If he conducts it longer, he does it at his own risk, and may be held accountable for any loss which thereby accrues to the estate.[4]

In a New York case,[5] Robinson, J., remarks: "The idea that a general assignee for the benefit of creditors can, in the exercise of any proper discretion imposed upon him by virtue of an assignment, proceed to conduct and carry on the previous business of the assignor so long as he pleases to do so, or to do any act in respect thereto, except such as tends to the most speedy conversion of the assigned estate into cash, is wholly untenable, and the acts of the assignee tending to any other result are (equally as if committed by the

[1] 22 Pick. 475. [2] 26 Vt. 462. [3] Id. 464.

[4] Patten's Estate, 2 Pars. (Penn.) Select Eq. Cas. 108; see Doyle v. Smith, 1 Cold. (Tenn.) 15.

[5] Levy's Accounting, 1 Abb. N. C. 186.

debtor) in fraud of the creditor, in hindering and delaying him in the realization of what is justly due him either from his debtor or from the assigned estate."

Nor is it every case, nor all matters of business, that will justify an assignee in conducting it under the assignment. It can only be allowed from the necessity of the case, and where it is manifestly for the benefit and advantage of the creditors and those interested in the estate.[1]

Thus, where the assignee individually owned one-fourth of a steamboat, and the other three-fourths belonged to the estate, and the assignee made repairs on the boat and defended suits brought against her, and ran her on joint account, and she was finally lost by fire, it was held to be inconsistent with his duty for the assignee to run the steamboat on joint account for himself and the estate. "No doubt," said Mr. Justice Leonard, in delivering the opinion of the court, "he had the right to run the steamboat, as he owned one-fourth, but he neglected his duty in not selling the interest of the estate in her for the best price that could be obtained, before any repairs or expenditures for running expenses were made." The court allowed the assignee three-fourths of the expense of defending the suits against the vessel, but nothing for the expense of repairs and running the vessel.[2] Thus, where a stock of goods in a retail business is assigned, the assignee cannot continue the business and retail the goods as before, with the view of obtaining higher prices, but must sell off at once.[3] And even where he is allowed to retail the goods for a limited time, as a more beneficial course to creditors than an immediate sale at auction, the sales must be uniformly for cash,[4] and there must be no new purchases with the proceeds,[5] nor any

[1] Patten's Estate, 2 Pars. (Penn.) Select Eq. Cas. 108.

[2] Duffy v. Duncan, 35 N. Y. 187; s. c. 32 Barb. 587; see Dunham v. Waterman, 17 N. Y. 9; rev'g 3 Duer, 166.

[3] Hart v. Crane, 7 Paige 37, 38; and see Whallon v. Scott, 10 Watts, 237; American Exchange Bank v. Inloes, 7 Md. 380.

[4] See Meacham v. Stearnes, 9 Paige, 398.

[5] See Connah v. Sedgwick, 1 Barb. S. C. 210.

act done or permitted, which can prevent the business from being at any time brought to an immediate close.

In a late case in New York,[1] the assets consisted of property used in a livery business, and debts due the assignor; there were chattel mortgages covering the property for more than its value. The assignor carried on the business for about two months at a loss, and then sold the entire property, subject to the mortgages, for one dollar.

It was held, on the accounting of the assignee, that items for receipts and disbursements while he was carrying on the business, were properly rejected; that he was simply authorized to convert the assets into money and distribute it among creditors, and the estate could not be charged with a loss incurred in an unauthorized use of the property; that the assignee was bound to exercise the diligence required of a paid agent or of a provident owner, and he was liable for ordinary negligence, or the want of that degree of diligence which persons of ordinary prudence are accustomed to use about their own business and affairs.

In Connecticut, the trustee may be authorized by the Court of Probate, before which the estate is in settlement, to work up and complete any stock and materials in an unfinished state, which belong to such estate, if it shall find that it will be for the interest of creditors.[2]

In Ohio[3] it is provided by statute that the court, on application of seven-eighths in number and amount of the creditors, may order the business of the assignor to be carried on by the assignee.

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[1] Matter of Dean, 86 N. Y. 398.

[2] Gen. Stat. (Rev. of 1875), p. 384, § 28.

[3] Laws of 1880, p. 190.

CHAPTER XXXIV.

COLLECTION OF DEBTS AND RECOVERY OF PROPERTY.—ACTIONS BY THE ASSIGNEE.

§ 398. Where possession of the assigned property cannot be obtained nor the debts collected without suit, the assignee has authority to commence and prosecute such suits, and to institute such other legal proceedings as he may be advised are necessary for the purpose. This he may do in his own name,[1] and without joining the creditors.[2] He should proceed with promptness, otherwise he may become personally liable to make good any loss occasioned by delay.[3] Where property conveyed in a deed of trust was taken under execution and sold, and the purchasers remained in peaceable possession for five years, before suit brought by the trustee or *cestui que trust* to recover it, it was held in Virginia that the statute of limitations was a bar to the recovery.[4]

In New Jersey, the assignee is expressly empowered by statute to sue for and recover, in his proper name, everything belonging to the estate, real or personal, of the debtor, with full power and authority to refer to arbitration, settle and compound, and agree with any person concerning the same, and to redeem all mortgages and conditional contracts, and generally to do whatever the debtor might.[5]

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[1] Ogden v. Prentice, 33 Barb. 161.

[2] Irwin v. Keen, 3 Whart. (Penn.) 347.

[3] It is the duty of the trustee to use all necessary means, by action or otherwise, to realize the debts; if a debt is lost by his neglect of duty, where the debtor had property sufficient to pay, he is personally responsible for the loss, although he may have acted without any improper motive. Royall's Adm'r v. McKenzie, 25 Ala. 363; McQueen v. Babcock, 41 Barb. 337; see Winn v. Crosby, 52 How. Pr. 174.

The duties of assignees are, so far as they are analogous, determined by the same rules as govern executors in similar circumstances. Jermain v. Pattison, 46 Barb. 9.

[4] Sheppards v. Turpin, 3 Gratt. 373. [5] Rev. of N. J. (1878), p. 39, § 13.

In Connecticut, the proceedings where parties having property of the assignor in their hands refuse to deliver it to the assignee, are regulated by statute, the particulars of which have already been given.[1]

It is also provided that trustees in insolvency of the estate of corporations shall have the same power to call for and collect unpaid capital as its directors would have had, and may proceed in the same manner to such an amount as the Court of Probate may direct.[2]

In Pennsylvania, assignees under a voluntary assignment have been held to have sufficient possession to entitle them to maintain trespass against a sheriff, who took goods from the assignor, although they had never taken actual possession of them.[3] And an assignee may make a contract with coun sel for the recovery of assets assigned.[4]

So in the same State, it has been held that the assignee of a corporation may enforce the power of the corporation to make the calls upon the stockholders necessary to enable him to settle with creditors.[5]

In New York, assignees are by statute empowered to maintain actions against every person who shall, in fraud of the rights of creditors and others, have received, taken, or in any manner interfered with the estate, property, or effects of any insolvent corporation, association, partnership, or

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[1] *Ante*, p. 567.

[2] Gen. Stat. (Rev. of 1875), p. 388, tit. 18, c. 11, § 23.

[3] Hower v. Geesaman, 17 S. & R. 251.

[4] McLellan's Appeal, 26 Penn. St. 463.

[5] Germantown Pass. R. R. Co. v. Fitler, 60 Penn. St. 155. But see Ohio Life Ins & Trust Co. v. Merchants' Ins. & Trust Co., 11 Humph. (Tenn.) 1; Wright v. McCormick, 17 Ohio St. 86; see Insurance Co. v. Jones, 35 Ohio St. 351.

In Craig's Appeal (92 Penn. St. 396), it was held, that the contributory share of the stockholders of an insolvent bank is to be ascertained, apportioned and enforced, either by process analogous to that prescribed for the benefit of note holders, in the 32d and 33d sections of the Banking Act of 1850, or by bill in equity. But an auditor has no such power. The authority to estimate the value of the property of the bank and apportion the deficit among the stockholders, is committed by law to the assignee.

In Missouri it has been held that a bill in equity will lie in favor of the assignee, to recover unpaid subscriptions to the stock of a corporation. Lionberger v. Broadway Savings Bank, 10 Mo. App. 499.

individual, to recover such property or its value, and damages.[1]

Under the Minnesota statutes an assignee, being the trustee of an express trust, is therefore the real party in interest, and can maintain an action in respect to the assigned property, in his own name, without joining the persons for whose benefit it is prosecuted, and without disclosing his representative character.[2]

§ 399. *Actions and Defenses against Creditors.*— An important class of actions by assignees are those which are instituted for the recovery of property assigned, which has been taken under attachments or executions issued in behalf of creditors of the assignor, and it is in actions of this class that questions involving the validity of assignments are constantly raised and determined. The defense of actions by creditors against assignors, where the assignees are summoned as trustees or garnishees, belongs to the same general head.[3]

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[1] Act of April 17, 1858, § 2; Laws of 1858, c. 314, p. 506; 3 Rev. Stat. (7th ed.) p. 2330. The purchaser of firm goods at a sheriff's sale, under an execution against one of two individuals composing a firm, is constituted a tenant in common of the goods with the other member, and, of course, with the trustee or assignee of the firm. But if such purchaser take all the goods away and sell them, the trustee may have *assumpsit* for the part of the money arising from the sale to which he is equitably entitled. Latham, trustee, v. Simmons, 3 Jones' L. 27. So where an assignee for the benefit of creditors sued the defendant for conversion of assigned property, it was held that the defendant might show that the property was seized by virtue of an attachment against the assignor, and that as against creditors the assignment was void for fraud, and that the defendant acted as attorney for the creditor who caused the attachment to issue. Fallon v. McCunn, 7 Bosw. (N. Y.) 141. But an assignment cannot be attacked collaterally in an action brought by the assignee, Ogden v. Prentice, 33 Barb. 160; Waterbury v. Westervelt, 9 N. Y. 598; Crosbie v. Leary, 6 Bosw. (N. Y.) 312; Thomas v. Talmadge, 16 Ohio St. 434; Rohrer v. Turrell, 4 Minn. 407.

Where the assignees of an insolvent bank, by virtue of the provisions of the act of April 16, 1850, brought an action against the maker of a note to the bank, it was held that he could not be permitted to set up as a defense, that the assignment was void as being contrary to the act of 1867. Shryock v. Basehore, 82 Penn. St. 159.

A person indebted to the estate cannot avail himself of a defense that the assignment is fraudulent and void as against creditors, if the assignment is sufficient to pass the title between the assignor and assignee. Sheridan v. Mayor, 68 N. Y. 30; Allen v. Brown, 44 Id. 228; Stone v. Frost, 61 Id. 614; Richardson v. Mead, 27 Barb. 178.

[2] Langdon v. Thompson, 25 Minn. 509.

[3] In Missouri, on the trial of an issue between the plaintiffs in an attachment and the assignees summoned as garnishees, the assignment is *prima facie* evidence

§ 400. *Actions against Assignor.*—Where the assignor himself withholds a portion of the property assigned, to which he is not entitled by law, the assignee may bring an action against him to recover it.[1] So, if he neglects to furnish a schedule required by the assignment, the assignee may file a bill of discovery against him, and also to obtain a delivery of the books and securities; and he will also be entitled to an injunction against the assignor, restraining him from wasting the property.[2]

In Indiana, property fraudulently withheld by the assignor or transferred, may be recovered by summary proceedings on a warrant for the arrest of the assignor, or the persons to whom such fraudulent transfer is believed to have been made, and all persons alleged to have been concerned in the fraud.[3]

So in Ohio, an examination of the debtor may be had on application of the assignee or any creditor; and the court may, upon or after such examination, make and enforce any order, upon proper parties, which it may deem necessary, to prevent any fraudulent transfer or change in the property or effects of the assignor, or the allowance or payment of any unjust or fraudulent claims out of his estate.[4]

§ 401. Where property obtained by the debtor as a fraudulent vendee, comes into the hands of his assignee for the benefit of creditors, the assignee stands in the place of his assignor, and has no higher rights of property than he.[5]

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that the persons therein named as creditors are, in fact, such. Gates v. Labeaume, 19 Mo. 17; see also Hutchinson v. Lord, 1 Wis. 286; McCracken v. Milhous, 7 Ill. App. (Bradw.) 169.

In Taylor v. Atwood (47 Conn. 498), a trustee in insolvency was allowed to bring an action for a reconveyance against a creditor who had obtained a conveyance of the debtor's property by fraud.

[1] Pike v. Bacon, 21 Me. 280.

[2] Keyes v. Brush, 2 Paige, 311.

[3] 1 Stat. of Ind. (G. & H.) p. 117, § 15; R. S. (1881), § 2676.

[4] Act of April 27, 1872; Sayler's Stat. vol. 3, p. 2759, c. 2232; 2 R. S. (1880), § 6349.

[5] Bliss v. Cottle, 32 Barb. 322; Kraft v. Dalles, 7 Ohio St. 116; Kennedy v. Thorp, 51 N. Y. 174. But the rule in Virginia is to the contrary. Wickham v. Martin, 13 Gratt. 427.

In such a case, it is sufficient for the defrauded vendor to give notice to the assignee of the fraud, and of his claim or election to rescind the contract, and to demand the property of him.

When there is no pretence that the assignee was a party to, or cognizant of, the fraud, he is not bound to give up the goods until he has been required to do so by the vendor upon a distinct demand, with notice of an explicit assertion of his claim that the goods were obtained by fraud; and such demand must be made by the vendor, or by some one duly authorized by him to make it.[1]

Where a vendor, from whom goods have been obtained by fraud, instead of disaffirming the contract of sale, affirms it by bringing suit thereon and prosecuting it to judgment, neither he nor a receiver appointed in supplemental proceedings instituted upon such judgment, can set up the fraud in the sale for the purpose of defeating an assignment of the property made by the vendee for the benefit of creditors, although the assignment was made in furtherance of the fraud, with full notice thereof on the part of the assignee.

The vendor had the option either to disaffirm the contract and retake the goods, or sue for their wrongful conversion, not only while they were in the hands of the vendee, but in the hands of any person who received them with knowledge of the fraud. The remedies are not concurrent, and the choice between them once being made, the right to follow the other is forever gone.[2]

An action may be maintained by the assignee of a firm, to recover partnership funds, applied by one partner in payment of his private debt, without the assent of his copartners, against the person receiving the same.[3]

Assignees have the authority—although not expressly given them in the assignment—to compromise or compound

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[1] Bliss v. Cottle, *supra*.

[2] Kennedy v. Thorp, 51 N. Y. 174; rev'g 2 Daly, 258; Morris v. Rexford, 18 N. Y. 552; Bank of Beloit v. Beale, 34 N. Y. 473.

[3] Thomas v. Penrich, 28 Ohio St. 55.

such debts as cannot be wholly collected, provided they act in good faith and do what is best for the creditors under the circumstances.[1]

This power is frequently conferred in the assignment, and in general is unobjectionable.[2] It is expressly given by statute in some of the States. Thus, in Indiana,[3] the trustee may compound or compromise any debt or claim belonging to the assignor which cannot otherwise be recovered without endangering the loss of the entire claim or debt. So in Ohio, it is provided that the assignee shall have power, by the direction of the probate judge, to compound and compromise any debt, claim or demand on behalf of his assignor that, in his opinion, cannot be otherwise recovered or collected.[4]

The statute in New York[5] is as follows: "The county judge of the county where the assignment is recorded may, upon the application of the assignee and for good and sufficient cause shown, and on such terms as he may direct, authorize the assignee to compromise or compound any claim or debt belonging to the estate of the debtor. But such authority shall not prevent any party interested in the trust estate from showing, upon the final accounting of such assignee, that such debt or claim was fraudulently or negligently compounded or compromised. And the assignee shall be charged with, and be liable for, as part of the trust fund, any sum which might or ought to have been collected by him."

Previous to this statute, the county court had no power to direct the assignee in the general administration of his trust. That power resides only in a court of equity.[6] Under this act the judge cannot make a general order allowing the assignee to compound such claims as he may think

[1] Anon. v. Gelpcke, 5 Hun, 245; but see Matter of Ransom, 8 Daly, 89.

[2] See *ante*, § 228.

[3] 1 Stat. of Ind. (G. & H.) p. 117, § 17; R. S. (1881), § 2676.

[4] Rev. Stat. (S. & C.), p. 716, § 18.

[5] Laws of 1877, c. 466, 23; 3 R. S. (7th ed.) p. 2281.

[6] Shipman's Petition, 1 Abb. N. C. 406.

proper to compound. The facts in each case should be presented to the judge.[1]

§ 402. *Costs.*—In New York, it has been held that security for costs cannot be demanded of assignees under a voluntary assignment for the benefit of creditors, who prosecute a suit in the name of the assignors; and that such suit is not within the statute[2] entitling the defendant to security for costs, where the suit is "for or in the name of the trustees of any debtor," the statute being considered to have been intended, not for cases of voluntary conventional assignments, but rather for a class of trustees created by operation of law, under the various statutes concerning insolvent debtors.[3] By statute, any assignee may recover from his *cestui que trust* all necessary and reasonable costs and expenses paid or incurred by him in good faith, in the prosecution or defense in good faith, of any action by or against him.[4]

It is provided in the Code,[5] that in an action prosecuted or defended by the trustee of an express trust, costs shall be recovered as in an action by or against a person prosecuting or defending in his own right, with certain exceptions, but such costs are chargeable upon and collectible from the estate fund or person represented, unless the court directs them to be paid by the party personally, for mismanagement or bad faith in the prosecution or defense of the action.

An assignee for the benefit of creditors is the trustee of an express trust within this provision.[6]

§ 403. *Set-off.*—It has already been said, that an assignee for the benefit of creditors takes the property of the assignor

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[1] Matter of Ransom, 8 Daly, 89.

[2] 2 R. S. (620), 515, § 1; see Code of Civil Proc. §§ 3268–3271.

[3] Ferris v. American Ins. Co. 22 Wend. 586.

[4] Act of April 17, 1858, § 3; Laws of 1858, p. 506; 3 Rev. Stat. (7th ed.) p. 2330.

[5] Code of Civ. Proc. § 3246.

[6] Cunningham v. McGregor, 12 How. Pr. 305; s. c. 5 Duer, 648; Cutler v. Reilly, 5 Robt. 637.

subject to all existing equities.[1] The equities need not exist at the inception of the debt. It is sufficient if they exist prior to the assignment.[2] A claim acquired after the assignment cannot be set off against the assignee;[3] nor a liability existing, but not due at the time of the assignment,[4] even if it becomes due before the suit was commenced.[5] And it has

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[1] See *ante*, p. 587.

[2] Waterman on Set-off, p. 118.

[3] Meyer v. Davis, 22 N. Y. 489; Johnson v. Bloodgood, 1 Johns. 51; Hegeman v. Hyslop, Anth. N. P. (N. Y.) 267; Smith v. Brinckerhoff, 6 N. Y. 305; Exch. Bank v. Knox, 19 Gratt. 739, 747; Martine v. Willis, 2 E. D. Smith, 524; Brown v. Brittain, 84 N. Ca. 552; Farmers' Bank v. Willis, 7 W. Va. 31; see Duncan v. Stanton, 30 Barb. 533; Fogerty v. Philadelphia Trust, &c. Co. 75 Penn. St. 125. The assignment of a non-negotiable demand arising on contract, before due, defeats a set-off by the debtor of an independent cross demand, on which no right of action had accrued at the time of the assignment. Fuller v. Steiglitz, 27 Ohio St. 355.

[4] Beckwith v. Union Bank, 9 N. Y. 211; Meyer v. Davis, 22 N. Y. 489; Lockwood v. Beckwith, 6 Mich. 168, 175; Lane v. Bailey, 47 Barb. 395; and see Lawrence v. Bank of Republic, 3 Robt. (N. Y.) 142; Willis v. Stewart, 3 Barb. 40; Thompson v. Hooker, 4 N. Y. Leg. Obs. 17.

In Meyer v. Davis, *supra*, where the assignors ordered certain goods to be manufactured for them, and before they were delivered, became insolvent and executed an assignment, it was held that in an action brought by their assignees, the claim arising upon the manufacture of the goods, could not be set off.

In Keep v. Lord (2 Duer, 78), where the action was by the assignee, for goods sold upon credit by the assignors, and the defendants at the time of the assignment were the holders of the assignor's note, which had not yet matured, it was held that the defendant could not set off the note. Bosworth, J., in delivering the opinion of the court, reviewed the cases extensively, and stated the conclusions of the court in the following language: "The principle of such a rule is that in case of distinct and independent demands owing by each of two persons to the other, an equitable right of set-off attaches, if one becomes insolvent, the moment the demand against the insolvent becomes due, and not before. That when insolvency is the only equity for enforcing a set-off contrary to the provisions of the statute, such equity gives no right to compel the insolvent to pay before the demand against him has become due." And upon this principle the court held that no equitable right to set off had attached at the time of the assignment.

See Maas v. Goodman, 2 Hilt. (N. Y.) 275, *contra;* and see Morrow v. Bright (20 Mo. 298), where the defendant sought to set off the amount paid by him after the assignment as indorser upon the assignor's note, and the claim was allowed.

In Martin v. Kunzmuller (37 N. Y. 396), the defendants were indebted at the time of the assignment to the assignors for goods sold, and held three promissory notes of the assignors, two of which had matured at the time of the assignment, the other being not yet due. The assignees brought an action upon the claim for goods sold. It was held that the defendants might offset the notes which had matured at the date of the assignment, but not the other note.

But when a claim in favor of the estate of the assignor is not due at the time of the assignment, but the claim against the estate is due, an equitable set-off in favor of the assignor's debtor will be allowed. Smith v. Felton, 43 N. Y. 419; Coffin v. McLean, 80 Id. 560; Smith v. Fox, 48 Id. 674; Lindsay v. Jackson, 2 Paige, 581: Barber v. Spencer, 11 Id. 517; Ainslie v. Boynton, 2 Barb. 258; Mel v. Holbrook, 4 Edw. Ch. 538.

[5] Hicks v. McGrorty, 2 Duer, 295; Martin v. Kunzmuller, 37 N. Y. 396.

been held that a defendant cannot offset to the claim of the assignee a note due when assigned, by showing that the assignor was indebted to the defendant at the time of the assignment, unless such counter-claim had attached before the assignment—*e. g.*, by an agreement that it should be applied thereto or otherwise.[1] A judgment obtained against the assignor subsequent to the assignment, cannot be set off against a claim of the assignee, although the assignment was made without notice to the judgment creditor.[2]

Nor can a creditor set off his demand against the value of articles purchased by him at the assignor's sale.[3] Equity will not permit a preferred creditor to diminish the fund available to unpreferred creditors, by offsetting to a debt due from him, and which is part of the assigned estate, liabilities to him not secured by the deed.[4] The principles applicable under the bankrupt act are referred to in the note.[5]

In action brought by a creditor to compel an accounting, the assignee cannot set up expenditures made by him by way

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[1] Neal v. Lea, 64 N. Ca. 678; McConnaughey v. Chambers, Id. 284. The North Carolina Code as to set-off is similar to that of New York. See Kendall v. Rider, 35 Barb. 100. But the Minnesota statute is different. See Martin v. Pillsbury, 23 Minn. 175. It is held in Pennsylvania that in a suit by assignees on a note to the assignor which did not fall due until after the assignment, the creditor may set-off a debt due to him by the assignor at the time of the assignment. Jordan v. Sharlock, 84 Penn. St. 366.

[2] Ogden v. Prentice, 33 Barb. 160.

[3] Bateman v. Conner, 1 Halst. 104.

[4] Miller v. Sherry, 3 Jones' Eq. (N. Ca.) 24. And in another case in the same State, a trustee who had purchased the trust property at his own sale, but without fraud, was permitted to set-off debts due him out of the increased price on a resale of the property, before the unsecured creditors could come in. Elliott v. Pool, 6 Jones' Eq. (N. Ca.) 42.

[5] Under the bankrupt act of 1867 (R. S. U. S. § 5073), it is provided that in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid, but no set-off shall be allowed in favor of any debtor to the bankrupt of a claim in its nature not provable against the estate, or of a claim purchased by or transferred to him after the filing of the petition, or in case of compulsory bankruptcy after the act of bankruptcy, upon or in respect of which the adjudication shall be made and with a view of making such set-off. Bump on Bankruptcy, p. 580; Sawyer v. Hoag, 9 N. B. R. 145; s. c. 17 Wall. 610; Gray v. Rollo, 9 N. B. R. 337; s. c. 18 Wall. 629; Drake v. Rollo, 4 N. B. R. 689; s. c. 3 Biss. 273; Hovey v. Home Ins. Co. 10 N. B. R. 224.

of counter-claims, and insist upon their allowance because no reply was interposed.[1]

In a case in Pennsylvania,[2] a bank made an assignment under the act of April 16, 1850, and was declared fraudulently insolvent. Under the Act of April 12, 1867, a bill was filed by the assignees against a director, charging him with misfeasance and neglect, whereby the fraudulent insolvency had been produced. The bill alleged that certain acts wherein the director had participated had resulted in a loss to the bank of a specific sum, and prayed for a decree against him for that amount. Pending these proceedings on the bill, the director commenced an action of *scire facias* against the assignees on a mortgage given to him by the bank to secure his deposits. The assignees proposed to give evidence of the misfeasance and neglect charged as a set-off to his claim. This was held not to be a proper set-off. No other remedy than that prescribed by the above statute could be enforced.

§ 404. *When the Declarations of the Assignor can be Used as Evidence against the Assignee.*—It is laid down as an established rule of evidence, that declarations made by a person under whom the party claims after the declarant has parted with his right, are utterly inadmissible to affect any one claiming under him.[3] The acts and declarations of the assignor, however, have in some instances been admitted as binding upon the assignee. Declarations made at the time of executing the assignment are thus admissible as part of the *res gestæ*,[4] and it has been held that the declarations of the assignor, while he was in possession of the assigned property, were competent evidence.[5] It has also been

[1] Duffy v. Duncan, 35 N. Y. 187, 189.

[2] Ahl v. Rhoades, 84 Penn. St. 319.

[3] 1 Philips on Ev. (4th ed.) 314-322; Paige v. Cagwin, 7 Hill, 361; Davis, J., in Foster v. Beals, 21 N. Y. 247, 249; Frankel v. Coots, 41 Mich. 75; see McBride v. Dorman, 6 Am. Law Reg. 736, and note.

[4] See *ante*, p. 527.

[5] Adams v. Davidson, 10 N. Y. 309, 313; citing Willis v. Farley, 6 C. & P. 375; but see this case criticised in Cuyler v. McCartney, 40 N. Y. 221, 235.

In an action by the assignee against the sheriff, it was held that if the assign-

thought that the admissions of the assignor, after the assignment was completed, were admissible on the theory that the assignee is the representative and agent of the assignor. This doctrine, however, is not sustained by principle or authority. There is no identity of interest between an insolvent assignor in trust for creditors and his assignee. The latter holds primarily for the creditors and for those in hostility to the assignor. He does not represent merely or primarily the assignor, nor hold chiefly for his interest and benefit, but rather for the creditors of the assignor, and is accountable in the first place to them.[1] In order to make the declarations of the assignor, after the assignment, competent evidence, it must be shown that the assignor and assignee are combined in a common conspiracy to defraud the assignor's creditors,[2] and this common purpose must be established by evidence other than the declarations themselves.[3]

§ 405. *Parties.*—Where the action is brought by the assignee, to recover trust property or to reduce it to possession, the assignee may sue in his own name,[4] and the *cestuis que trust* are not necessary or proper parties.[5]

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or was permitted to retain possession of the property assigned, his statements made in the assignee's absence were admissible. Frankel v. Coots, 41 Mich. 75.

[1] Folger, J., in Bullis v. Montgomery, 50 N. Y. 352, 358, 359; Cuyler v. McCartney, 40 N. Y. 221, 235; Caldwell v. Williams, 1 Ind. 405, and see reporter's note; Wynne v. Glidewell, 17 Ind. 446; Savery v. Spaulding, 8 Iowa, 230; see Hairgrove v. Millington, 8 Kans. 480.

[2] Cuyler v. McCartney, 40 N. Y. 221; Newlin v. Lyon, 49 Id. 661; Caldwell v. Williams, 1 Ind. 405.

[3] Cuyler v. McCartney, *supra.*

[4] Ogden v. Prentice, 33 Barb. 160; Langdon v. Thompson, 25 Minn. 509; see *ante*, § 398; and see Walker v. Miller, 11 Ala. 1067; Johnson v. Candage, 31 Me. 28.

[5] In Carey v. Brown (92 U. S. 171), the general rule is said to be that in suits respecting the trust property, brought either by or against the trustees, the *cestuis que trust* as well as the trustee are necessary parties. Story's Eq. Pl. § 207. "But to this rule there are several exceptions. One of them is, that where the suit is brought by the trustee to recover the trust property, or to reduce it to possession, and in no wise affects his relation with his *cestuis que trust*, it is unnecessary to make the latter parties. Horsely v. Fawcett (11 Beav. 569), was a case of this kind—the objection taken in this case was taken there. The master of the rolls said: 'If the object of the bill were to recover the fund, with a view to its administration by the court, the parties interested must be represented. But it merely seeks to recover the trust moneys, so as to enable the trustees hereafter to

In New York it is provided by the Code that the trustee of an express trust may sue without joining with him the persons for whose benefit the action is prosecuted;[1] and it has been decided that an assignee may bring an action to collect a debt due the estate, in his own name, or in his representative capacity.[2] All the assignees who accept must join in bringing suit.[3]

§ 406. *Appeals and Writs of Error.*—In Pennsylvania, it is provided by statute that when the defendant or defendants in any suit now pending, or hereafter to be brought, have assigned, for the benefit of creditors, before or after such suit brought, or hereafter may assign, for the benefit of creditors, the land or other property which is the subject of or affected by such suit, the assignee or assignees may appeal from any award made in such suit against the defendant or defendants, under a rule of reference entered under the 8th section of the act of the 16th of June, 1836, entitled "An act relative to reference and arbitration;" and also bring a writ of error upon any judgment which may be rendered in any such suit.[4] By the same act, the provisions of the 31st section of the said act of June 16th, 1836, relating to reference and arbitration,[5] and the first proviso of the 8th section

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distribute them agreeably to the trusts declared. It is therefore unnecessary to bring before the court the parties beneficially interested.' Such is now the settled rule of equity pleading and practice. Adams v. Bradey et al. 6 Mich. 346; Ashton v. The Atlantic Bank, 3 Allen, 217; Boyden v. Partridge et al. 2 Gray, 191; Swift et al. v. Stebbins, 14 Stew. & P. 447; The Association, etc. v. Beekman's Adm'r et al. 21 Barb. 555; Alexander v. Cana, 1 De Gex and Sm. Ch. 415; Potts v. The Thames Haven and Dock Co., 7 Eng. Law & Eq. 262; Story v. Livingston's Exr. 13 Pet. 359."

In Meyers v. Briggs (11 R. I. 180), a wagon belonging to E. and A. was placed by them in the hands of B. for sale. Subsequently E. and A. assigned to H. Trover was afterward brought against B. by "E. and A., trustees for H." It was held that the assignment gave good title to H. and that the action was improperly brought in the name of E. and A., trustees.

[1] Code Civ. Proc. § 449.

[2] Hoagland v. Trask, 48 N. Y. 686; Ogden v. Prentice, 33 Barb. 160.

[3] Brinkerhoff v. Wemple, 1 Wend. 470; Thatcher v. Candee, 4 Abb. Dec. 387; Van Valkenberg v. Elmendorf, 13 Johns. 314.

[4] Act of June 13, 1840, § 9; Laws of 1840, p. 691; Purdon's Dig. (10th ed.) p. 92, pl. 15.

[5] This provides that they may appeal without payment of costs or entering security, if the assignee shall not have taken out the rule of reference. Purdon's Dig. p. 93, note (*g*).

of the act of June 16th, 1836, entitled "An act relating to executions,"[1] are extended to the assignee of voluntary assignments for the benefit of creditors, whenever such assignee shall enter an appeal, or sue out a writ of error under the provisions of the ninth section of the act.[2]

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[1] This provides that they shall not be required to give bail in error. Id. note (*h*).

[2] Act of June 13, 1840, § 10; Purdon's Dig. p. 93. pl. 16. But in Mellon's Appeal (32 Penn. St. 121), it was held that an assignee could not appeal from a distribution of a trust fund in his hands. Strong, J., remarked, he is not "a party aggrieved, within the meaning of the act of 1836, because he does not represent the creditors generally." Where, however, he is a creditor, or has some personal interest in the estate, it seems that he may appeal. Singmaster's Appeal, 86 Penn. St. 169.

In Brigel v. Starbuck (34 Ohio St. 280), it was held that an order, decision or decree of the probate court, in a proceeding under the statutes, in relation to assignments, is not appealable to the court of common pleas, unless it is of a definitive nature affecting property rights, and the approval by the probate court of the election of an assignee by the creditors, is not an order, decision or decree of that nature.

CHAPTER XXXV.

SALE OF THE ASSIGNED PROPERTY.

One of the principal objects of a voluntary assignment of property for the benefit of creditors, and one of the most important duties of the assignee in the execution of the trust, is the *sale* of the property assigned, in order to convert it into money for the purpose of distribution among creditors. The property must, in all cases, be disposed of by sale. The assignee is not allowed to barter or exchange it for other property,[1] nor can he appropriate it for his own use, although he charge himself with the cost price.[2]

§ 407. *Power of Sale.*—The power to sell is usually expressly given by the assignment. But it is always necessarily implied by every conveyance for the payment of debts.[3] In some States, it is formally conferred by statute. Thus, in New Jersey, it is declared that every assignee shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment.[4] In Connecticut, the courts of probate have power, at all times, to order the sale of all or any part of the assigned property.[5]

In Iowa, it is provided that the assignee shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the as-

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[1] Bennett, J., in Page v. Olcott, 28 Vt. 465, 469; Geisse v. Beall, 8 Wis. 367. As to the liability of the assignee in case of a barter or exchange of the property, see *post*, Chap. XL.

[2] Geisse v. Beall, *ubi supra*.

[3] Williams v. Otey, 8 Humph, 563; Wood v. White, 4 M. & C. 481; Goodrich v. Proctor, 1 Gray, 567; Purdie v. Whitney, 20 Pick. 25; Gould v. Lamb, 11 Metc. 842; Perry on Trusts, pp. 147, 398.

[4] Rev. Stat. (ed. 1878), p. 39, § 13.

[5] Gen. Stat. (Rev. of 1875), p. 383, § 23.

signment, but no sale of real estate belonging to the trust shall be made without notice published, as in case of sales of real estate on execution, unless the court shall order and direct otherwise.[1] A similar statute exists in Illinois.[2]

In Pennsylvania,[3] provision has been made by statute to enable assignees to make sales of real estate incumbered by liens.

§ 408. *Duty in regard to Sale.*—Every trustee to sell is bound by his office to bring the estate to a sale under every possible advantage to the *cestui que trust*,[4] and where there are several persons interested, with a fair and impartial attention to the interest of all concerned.[5] He is bound to use not only good faith, but also every requisite degree of diligence and prudence in conducting the sale. If he is wanting in reasonable diligence in the management of the sale, or so manages it as to advance the interest of one of the parties to the injury of another, he will be personally liable to make good to the party suffering from his misconduct the amount of his loss.[6]

It is the duty of the assignee to be present at the sale, and to superintend and control it; and if the sale is so conducted as to prevent fair competition, whether cognizant of the circumstances or not, he is bound to make good the loss, and should be charged in the settlement of his accounts with the fair value of the property sold and interest upon it just as if the money had been received.[7]

A trustee who sells at an improper time, or without conforming to the conditions of his power, will be liable for a

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[1] Iowa Code (1880), p. 572, § 2127.

[2] R. S. of Ill. (Cothran, 1881), p. 120, § 11.

[3] Laws of 1876, p. 4; Laws of 1881, p. 102.

[4] Lord Eldon in Downs v. Grazebrook, 3 Mer. 208; Matthie v. Edwards, 2 Coll. 480; Chesley v. Chesley, 49 Mo. 540.

[5] Sir J. Leach in Ord v. Noel, 5 Mad. 440; Hunt v. Bass, 2 Dev. Eq. 292.

[6] Lewin on Trusts, 367, 368; Perry on Trusts, 404; Pechell v. Fowler, 2 Anst. 550; Johnston v. Eason, 2 Ired. Eq. 330; Quackenbush v. Leonard, 9 Paige, 347; Ringgold v. Ringgold, 1 H. & G. 11; Osgood v. Franklin, 2 Johns. Ch. 27; Chesley v. Chesley, 49 Mo. 540.

[7] Harvey's Adm'r v. Steptoe's Adm'r, 17 Gratt. 289.

deficiency of the proceeds of sale, though his intentions were good. He will be held responsible for the highest value the property can be shown to have had, and be decreed to account for the difference.[1]

In New York it has been held that the county court has no power to set aside, on motion, a sale made by an assignee, on the ground that the price paid was insufficient, and that a better one can be obtained.[2]

§ 409. *Time of Sale.*—An assignee is bound to bring the property to a sale, and to pay over the proceeds to those who are entitled thereto without delay.[3] If he delay unreasonably to sell, this may be evidence of fraud, and the property may be attached or levied upon as the debtor's.[4] And according to some decisions, he is guilty of a breach of trust if he delays a sale for the purpose of retailing the goods.[5] In cases of deeds of trust for the double purpose of security and sale, less dispatch is usually required, and a mere delay in selling will not avoid the deed, unless the delay and the uses had of the property by the debtor are such as to give him a false credit, and hold him out to the world as the owner of the property.[6] Indeed, it has been held that a trustee in a deed of trust to pay debts is not bound to sell within a particular time, but should use his discretion in the matter in order to obtain the highest price.[7]

§ 410. *Mode of Sale.*—An assignee, in general, has a dis-

[1] Melick v. Voorhies, 24 N. J. Eq. 305.

[2] Matter of Rider, 23 Hun, 91.

[3] Hart v. Crane, 7 Paige, 37. In Clark v. Craig (29 Mich. 398), where it appeared that most of the property was sold and most of the assets realized in not much more than a year, and the whole, with few exceptions, in little over two years, this was not regarded as evidence of a culpable delay in realizing the proceeds of the fund.

[4] Parker, C. J., in Gore v. Clisby, 8 Pick. 555, 559. For any mere delay in payment, interest is in law regarded as a sufficient compensation. Clark v. Craig, 29 Mich. 398.

[5] Hart v. Crane, *ubi supra*. Sales need not always be made immediately and for cash, whether well or ill for the creditors, but this may be left to the sound discretion of the trustees. Inloes v. Am. Ex. Bank, 11 Md. 173.

[6] Burgin v. Burgin, 1 Ired. L. 453; Dewey v. Littlejohn, 2 Ired. Eq. 495.

[7] Hawkins v. Alston, 4 Ired. Eq. 137. And see further, as to sales under deeds of trust, Haynes v. Crutchfield, 7 Ala. 189; Dubose v. Dubose, Id. 235.

cretion (apart from the authority usually given by the assignment) to sell at public or private sale, as may appear to be most for the interest of the creditors.[1] The proper course is said to be, if he cannot sell the property for its fair cash value at private sale immediately, to sell at auction, giving to the creditors reasonable notice of the sale; and he cannot delay a sale for the purpose of retailing the goods.[2] Where the deed expressly directs him to sell by public auction, the trustee is bound to conform to that mode of sale, and cannot adopt any other, although by doing so he may in reality promote the interests of those for whom he acts.[3] And in general, a trustee for sale must follow the provisions of the trust deed.[4]

§ 411. *Terms of Sale.*—In some of the States, an assignee is allowed to sell the property for cash or credit, in his discretion,[5] and the assignment itself frequently gives him this power in terms.[6] But in New York, an assignee is not allowed to sell on credit without obtaining leave from the court, on application, with notice to the *cestuis que trust*, or without obtaining their consent;[7] and an authority to sell on credit will render an assignment void.[8] In Missouri,

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[1] Perry on Trusts, pp. 412, 415, 422; Ex parte Dunman, 2 Rose, 66; Ex parte Hurley, 1 D. & C. 631; Ex parte Ladbroke, 1 M. & A. 384; Ex parte Goding, 1 D. & C. 323; Huger v. Huger, 9 Rich. Eq. 217.

In order that a better price might be obtained for a debtor's property, certain execution creditors agreed with the sheriff that the assignee appointed after *fi. fa.* issued and levy made, should sell the property and account to the sheriff for the proceeds. It was held that in the absence of fraud, the execution being *bona fide*, the lien of the execution creditors was not made void by this agreement. Kent's Appeal, 87 Penn. St. 165.

[2] Walworth, C., in Hart v. Crane, 7 Paige, 37, 38.

[3] Greenleaf v. Queen, 1 Pet. 138.

[4] Bebee v. De Baun, 8 Ark. 510. And as to the mode of sale, see Brock v. Headen, 13 Ala. 370.

[5] Neally v. Ambrose, 21 Pick. 185; Petrikin v. Davis, 1 Morris, 296; Conkling v. Conrad, 6 Ohio St. 611, 620, 621; Hopkins v. Ray, 1 Metc. 79; and as to what provisions are construed as conferring a power to sell on credit, see *ante*, § 224.

[6] See *ante*, pp. 319 *et seq.*

[7] Barculo, J., in Burdick v. Post, 12 Barb. 184. As to obtaining the consent of creditors, see Mussey v. Noyes, cited *post*, p. 622, note 5.

[8] Barney v. Griffin, 2 N. Y. 365; Nicholson v. Leavitt, 6 Id. 510.

sales by assignees are made under the supervision of the Circuit Court or a judge in vacation, who is required to direct the sale to be for cash or on credit, as shall appear to be for the interest of all concerned, and to direct the nature of the security to be taken at the sales.[1] A similar provision is made in Kansas.[2]

In Indiana, the assignee is authorized to sell the real and personal property at public auction, after thirty days' notice of the time and place of sale, to the highest bidder for cash or upon credit, the trustee taking notes, with security to be approved by him, payable not more than nine months from date with interest.[3]

In Connecticut, the trustee may be authorized by the court to sell on credit on the payment of at least one-quarter of the price in cash and the remainder secured in such manner as the court may approve.[4]

In Ohio, the assignee is authorized to sell the real and personal property assigned, either for cash, or upon such terms as the court may order, at public auction, on notice of four weeks, but sales of real estate are not to be made at less than two-thirds of the appraised value. The property may be sold at private sale upon the order of the court, and the personal property may be sold for less than two-thirds of the appraisement, upon good cause shown to the court. If a sale of real estate is confirmed, deeds are to be made, conveying the title free from all liens for all debts due by the assignor. The real estate may be sold free of the wife's contingent right of dower, by making her a party to an application to the court for the purpose.[5]

Where sales on credit are allowed, if the assignee sell at private sale except for cash, he may expose himself to lia-

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[1] Gen. Stat. (Wag.) p. 156, § 34; R. S. (1879), § 386.

[2] Comp. L. (1881), p. 102, § 34.

[3] Rev. Stat. (ed. 1870), vol. I, p. 114, § 10. But the neglect of the assignee to require security will not avoid the sale. Yargan v. Shriner, 26 Ind. 369.

[4] Gen. Stat. (Rev. of 1875), p. 383, § 23.

[5] Laws of 1880, p. 189; see Conkling v. Conrad, 6 Ohio St. 611; Dwyer v. Garlough, 31 Id. 158; Aultman v. Seiberling, 31 Id. 201.

bility in the event of the failure of the purchaser. Thus, in Pennsylvania, where assignees sold some of the goods at private sale and delivered them to the purchaser, who failed to pay, it was held that they were chargeable with the amount, it appearing that the credit of the vendee was doubtful, and that the assignors had refused to trust him before the assignment.[1] And if an assignee sells the assigned property on a credit without taking security, he sells at his own risk, and is chargeable with any loss that may thereby accrue, although the sale is advised by some of the creditors and the debtor.[2]

Where the liens on the property, due and payable presently, are sufficient in amount to exhaust the purchase-money, the sale should be for cash unless all parties interested unite in requesting a time sale. If a time sale carries interest, the interest should be divided *pro rata* among the creditors, as the instalments of the principal fall due.[3]

In Vermont, if an assignee sells on credit, he will be charged with the cash value of the property at the time of the sale, and interest on the same from the time of the sale.[4] But he may sell on credit, under the advice and with the consent of the creditors.[5] In case of a deed of trust, it has been held that the maker and beneficiaries may change the terms of the sale.[6]

§ 412. *Notice of Sale.*—Where the sale is by auction, it should be preceded by a public notice of the time and place,[7] the usual mode of which is by advertisement. The length

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[1] Estate of Davis & Desauque, 5 Whart. 530.

[2] Swoyer's Appeal, 5 Barr, 337.

[3] Burkholder's Appeal, 94 Penn. St. 522.

[4] Page v. Olcott, 28 Vt. 465; Bennett, J., Id. 468.

[5] Mussey v. Noyes, 26 Vt. 462, 464. The reason given in this case was, that it was customary to make such sales on credit in the country, and that thereby the property could be disposed of at higher prices. Id. ibid. But it appeared that the assignee had not lost or failed to collect the avails of any sale thus made on credit. Id. ibid.

[6] Bebee v. De Baun, 8 Ark. 510.

[7] Hart v. Crane, 7 Paige, 37, 38; Johnston v. Eason, 3 Ired. Eq. 330.

of the notice is sometimes fixed by the assignment itself.[1] In some instances it is regulated, as well as the mode of the notice, by statute. In New Jersey, the assignee is required to advertise and sell in the same manner as is prescribed in the case of an executor or administrator directed to sell lands by an order of the orphan's court for the payment of the debts of a testator or intestate.[2] If no time is fixed, a reasonable notice should be given.[3] In Minuse v. Cox,[4] it was held that where a trustee is directed to sell the trust property, "by public auction or otherwise, and together or by parcels, at his discretion, upon giving three weeks' notice thereof," the direction as to notice applies to a sale at auction, and not to a private sale;[5] and that, even if the notice was to be held to apply to both a public and a private sale, a sale without notice would be valid, and confer a good title on the purchaser; and the only consequence would be that the trustee might be responsible for any deficiency in the price for which it sold below the real value of the land.[6]

In deeds of trust, it is sometimes left to the trustee or one of the creditors to prescribe the day of sale and the length of time for which notice shall be advertised. But in such

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[1] Minuse v. Cox, 5 Johns. Ch. 441. Where a deed of trust requires twenty days' previous notice of the time and place of sale, it is not sufficient to have it published but once. The obvious intent is to have the publication continued up to the sale. Stine v. Wilkson, 10 Mo. 75. Where a notice was published once in a newspaper called the "Evening Gazette," and then transferred to a newspaper called the "Atlas," it was held insufficient, although the Atlas was the weekly reprint of the Evening Gazette, a daily paper, it appearing that the Atlas was published for and circulated in the country, while the Gazette was almost entirely confined in its circulation to the city. Id. ibid.

[2] Rev. Stat. (ed. 1878), p. 39, § 12.

[3] Walworth, C., in Hart v. Crane, *ubi supra*. And a sale by an assignee without public notice, and without disclosing the nature of the debtor's interest, and for an inadequate price, is evidence of fraud, and the assignee will be personally liable to the creditors for the loss resulting from such fraud. Hays v. Doane, 11 N. J. Eq. 84.

[4] 5 Johns. Ch. 441.

[5] "To give three weeks' notice of a private sale would be absurd." Kent, C., Id. 447.

[6] This doctrine is disapproved by Chancellor Tucker, who states the rule to be, that where a trustee is authorized to sell upon notice, if he sells without, and executes a deed, the legal title passes. 6 Munf. 358, 367. But the sale may be set aside in equity. 4 Munf. 421; 4 Cranch, 403; 2 Tuck. Com. [458] 446.

case, the failure to notify any of the creditors of the time and place will not warrant the inference that the sale was fraudulent as to one of the creditors provided for, who attended and purchased property; and the grantor who assents to the sale cannot upon that ground defeat an action by the purchaser for the recovery of the articles sold.[1]

§ 413. *Disability of Assignee to Purchase.*—The general rule, as now settled in England,[2] is that a trustee for sale is disabled from purchasing the trust property,[3] whether it be real estate or chattels personal,[4] whether the purchase be made in his own name or in the name of a trustee,[5] by private contract or public auction,[6] from himself as the single trustee, or with the sanction of his co-trustees;[7] for he who undertakes to act for another in any matter cannot, in the same matter, act for himself.[8] The situation of the trustee gives him an opportunity of knowing the value of the property, and as he acquires that knowledge at the expense of

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[1] Haynes v. Critchfield, 7 Ala. 189; and see Lamb v. Goodwin, 10 Ired. L. 320.

[2] What follows in the text, to page 626, is chiefly taken from the valuable treatise of Mr. Lewin on Trusts and Trustees, republished in the Philadelphia Law Library, 1839. See Perry on Trusts, §§ 195, 199.

[3] Fox v. Mackreth, 2 Bro. C. C. 400; s. c. 2 Cox, 320; affi'd in Dom. Proc. 4 Cro. P. C. 258; Lewin on Trusts, 376. The English cases are very elaborately reviewed in the case of Aberdeen R. R. Co. v. Blaklie Brothers, 1 Macy, 461, in the House of Lords.

[4] Crowe v. Ballard, 2 Cox, 253; s. c. 3 Bro. C. C. 117; Killick v. Flexney, 4 Bro. C. C. 161; Hall v. Hallet, 1 Cox, 134; Whatton v. Toone, 5 Mad. 54; 6 Id. 153. A purchase by a trustee, under a trust for payment of creditors, of a debt owing by the insolvent, will be void by reason of the knowledge which his position as trustee enables the purchaser to acquire. Hamilton v. Wright, 1 Bell's (Scotch) Appeal Cas. 574.

[5] Campbell v. Walker, 5 Ves. Jr. 678; s. c. 13 Id. 601; Randall v. Errington, 10 Id. 423; Crowe v. Ballard, 2 Cox, 253; Hall v. Hallet, 1 Cox, 134.

[6] Campbell v. Walker, *ubi supra;* Randall v. Errington, *ubi supra;* Ex parte Bennett, 10 Ves. Jr. 381, 393; Ex parte James, 8 Id. 337, 349; Whelpdale v. Cookson, 1 Ves. Sr. 9; Ex parte Hughes, 6 Ves. Jr. 617; Ex parte Lacy, Id. 625; Lister v. Lister, Id. 631; Whichcote v. Lawrence, 3 Id. 740; Attorney General v. Lord Dudley, Coop. 146; Downes v. Grazebrook, 3 Mer. 200.

[7] Whichcote v. Lawrence, 3 Ves. Jr. 740; Hall v. Noyes, cited Id. 748; and see Morse v. Royal, 12 Id. 374.

[8] Lord Rosslyn, in Whichcote v. Lawrence, 3 Ves. Jr. 750; Lord Eldon in Ex parte Lacy, 6 Id. 628.

the *cestui que trust*, he is bound to apply it for the *cestui que trust's* benefit.[1]

Where a trustee deals with trust property as his own, he takes upon himself all the risk and responsibility without the right or prospect of personal benefit, for he must be liable for the value of the trust property and all that is gained by it.[2]

Lord Rosslyn is said to have considered that to invalidate a purchase by a trustee, it was necessary to show that he had gained an actual advantage;[3] but the doctrine, if any such was ever held by his lordship,[4] has since been expressly and unequivocally denied.[5] The rule is now universal that, however fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property.[6]

As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as agent for a third person; the court can, with as little effect, examine how far the trustee has made an undue use of information acquired by him in the course of his duty, in the one case as in the other.[7]

And the rule against purchasing the trust property applies to an agent employed by the trustee for the purposes

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[1] See Ex parte James, 8 Ves. Jr. 348. The rule that a trustee is not to be allowed to make a profit of his trust is based on a rule of human nature, that no person having a duty to perform shall be allowed to place himself in a situation in which his interest and his duty may conflict. Broughton v. Broughton, 31 Eng. L. & Eq. 587.

[2] Blauvelt v. Ackerman, 20 N. J. Eq. 141; citing Green v. Winter, 1 Johns. Ch. 27; Parkist v. Alexander, Id. 394; Schieffelin v. Stewart, Id. 620; Brown v. Rickets, 4 Johns. Ch. 303: Evertson v. Tappen, 4 Id. 597; Hawley v. Mancius, 7 Id. 174; Holridge v. Gillespie, 2 Id. 30; Mathews v. Dragand, 3 Des. 25; Trenton Bank v. Woodruff, Green Ch. (N. J.) 117.

[3] See Whichcote v. Lawrence, 3 Ves. Jr. 750.

[4] See Ex parte Vacey, 6 Ves. Jr. 626; Lister v. Lister, Id. 632.

[5] Ex parte Bennett, 10 Ves. Jr. 385; Ex parte Lacey, 6 Id. 627; Attorney General v. Lord Dudley, Coop. 148; Ex parte James, 8 Ves. Jr. 348.

[6] Ex parte Lacey, 6 Ves. Jr. 623, 627; Owen v. Foulkes, cited Id. 630, note b; Lord Eldon, in Ex parte Bennett, 10 Id. 393; Randall v. Errington, 10 Id. 423, 428; Campbell v. Walker, 5 Id. 678, 680; Lord Eldon, in Ex parte James, 8 Id. 347, 348; Lister v. Lister, 6 Id. 631; Lord Eldon, in Gibson v. Jeyes, 6 Id. 277; but see Kilbee v. Sneyd, 2 Moll. 186.

[7] Ex parte Bennett, 10 Ves. Jr. 381, 400; Lord Eldon, in Coles v. Trecothick, 9 Id. 148; and see Gregory v. Gregory, Coop. 204.

of the sale, as strongly as to the trustee himself.[1] And in a case in bankruptcy, where the partner of an assignee had bid on behalf of the firm at a sale under the fiat, and had been declared the purchaser of part of the bankrupt's estate, the court directed a resale, and ordered him and his partner to pay the costs personally.[2]

The rule prohibiting a trustee or assignee from purchasing the trust estate, either directly or indirectly, has been generally adopted in the United States.[3] In New York, it

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[1] Whitcomb v. Minchin, 5 Mad. 91; Lewin on Trusts, 376–378. The intervention of a third person as a means or channel through whom the title is transferred and eventually vested in the trustee, will not uphold the transaction and sustain the title of the latter. Abbott v. Am. Hard Rub. Co. 33 Barb. 578; Butler's Appeal, 26 Penn. St. 63; but see Miller v. Mulford, 31 N. J. Eq. 661. After a sale of goods fairly made by an assignee, he may repurchase them for his own private use and benefit. Lininger v. Raymond, 12 Neb. 19, 167.

[2] Ex parte Burnell, 12 Law J. N. S. 23; 7 Jur. 116.

[3] "It may be observed as a general rule applicable to sales," remarks Chancellor Kent, "that when a trustee of any description, or any person acting as agent for others, sells a trust estate and becomes himself interested, either directly or indirectly in the purchase, the *cestui que trust* is entitled, as of course, in his election, to acquiesce in the sale or to have the property re-exposed to sale under the direction of the court, and to be put up at the price bid by the trustee; and it makes no difference in the application of the rule, that the sale was at public auction, *bona fide*, and for a fair price. A person cannot act as agent for another, and become himself the buyer. He cannot be both buyer and seller at the same time, or connect his own interest with his dealings as an agent or trustee for another. It is incompatible with the fiduciary relation. *Emptor emit quam minimo potest; venditor vendit quam maximo potest.* The rule is founded on the danger of imposition, and the presumption of the existence of fraud inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which in the cases in which such relationship exists, is deemed to be of itself sufficient to create the disqualification. This principle, like most others, may be subject to some qualification in its application to particular cases; but, as a general rule, it appears to be well settled in the English and in our American jurisprudence." 4 Kent's Com. [438] 475. "It may be laid down as a general proposition," observes Chancellor Tucker, "that trustees, executors, agents, commissioners for sales, sheriffs and auctioneers, are incapable of purchasing at sales made by themselves, or under their authority or direction. To permit persons standing in the position of sellers to be at the same time buyers, is to invest them at the same moment with inconsistent, contradictory and conflicting characters. * * * The purchase is not to be permitted in any case, however honest be the circumstances; the general interests of justice requiring the practice to be wholly discountenanced, as no court is equal to the examination and ascertainment of the real character of the transaction in every instance." 2 Tucker's Com. [459] 447, 448. "It may be laid down as a general rule," observes Mr. Justice Story, "that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which [can] have a tendency to interfere with his duty in discharging it. And this doctrine applies not only to trustees, strictly so called, but to other persons standing in like situation; such as assignees and solicitors in a bankrupt or insolvent estate, who are never permitted to become purchasers at the sale of the bankrupt or insolvent estate." 1 Story's Eq. Jur. § 322. And see Story on Agency, § 211; 2 Story's Eq. Jur.

was held by the chancellor, in Davoue v. Fanning,[1] that if a trustee or person acting for others sells the trust estate, and becomes himself interested in the purchase, the *cestuis que trust* are entitled, as of course, to have the purchase set aside, and the property re-exposed to sale, under the direction of the court. And it makes no difference in the application of the rule, that a sale was at public auction, *bona fide*, and for a fair price. The same general doctrine has been repeatedly recognized in this State, and in some very recent cases.[2]

The same rule has been adopted in Maine,[3] Massachusetts,[4] Connecticut,[5] New Jersey,[6] Pennsylvania,[7] Ohio,[8] Indiana,[9] Illinois,[10] North Carolina,[11] Maryland,[12] South Caro-

§ 1261; and the American editor's note to Whichcote v. Lawrence, 3 Ves. Jr. 740 (Sumner's ed.), and to Campbell v. Walker, 5 Id. 678; see also the opinion of Wayne, J., in the important case of Michoud v. Girod, 4 How. 503, 554–558.

[1] 2 Johns. Ch. 252. In this case, which is a leading case on the point, the authorities up to the time of the decision were fully examined, and the doctrine traced to the civil law. The following passage from the Digest shows that it was well settled in Roman jurisprudence: *Non licit ex officio quod administrat quis emere quid, vel per se, vel aliam personam.* Dig. 18, 1, 46; and see Dig. 18, 1, 34, 7; Dig. 26, 8, 5, 2. See also the references to the civil law, in the case of Michoud v. Girod, 4 How. 559, 560.

[2] Van Horne v. Fonda, 5 Johns. Ch. 388; Hawley v. Cramer, 4 Cow. 717; 718; Giddings v. Eastman, 5 Paige, 561; Campbell v. Johnson, 1 Sandf. Ch. 148; Slade v. Van Vechten, 11 Paige, 21; Iddings v. Bruen, 4 Sandf. Ch. 223; Ames v. Downing, 1 Bradf. 321; Colburn v. Morton, 3 Keyes, 296; Abbott v. Am. Hard Rub. Co. 33 Barb. 570.

[3] Pratt v. Thornton, 28 Me. 355.

[4] Copeland v. Mercantile Ins. Co. 6 Pick. 198; Litchfield v. Cudworth, 15 Id. 21, 23; Arnold v. Brown, 24 Id. 89; Morton, J., Id. 96.

[5] Mills v. Goodsell, 5 Conn. 475.

[6] Den v. Wright, 2 Halst. 175; Den v. McKnight, 6 Id. 385; Blauvelt v. Ackerman, 20 N. J. Eq. 141; Melick v. Voorhies, 24 N. J. Eq. 305.

[7] Lessee of Lazarus v. Bryson, 3 Binn. 54; Campbell v. Penn. Life Ins. Co. 2 Whart. 61; Bartholomew v. Leach, 7 Watts, 472; Painter v. Henderson, 7 Barr, 48; Beeson v. Beeson, 9 Id. 279; as to bidding in land mortgaged, see Winebrener's Appeal, 7 Id. 338.

In Sheffy's Appeal (97 Penn. St. 317) the assignee, who was also a judgment creditor, became a purchaser at the sale, and bought, subject to mortgages which he afterward paid. It was held that he was not entitled to subrogation as against the assignors personally for the sum paid in discharging the mortgages; that he could not manipulate the estate to his advantage as a creditor beyond what he would have did he appear only as a lien creditor.

[8] Wade v. Pettibone, 11 Ohio, 57; Bohart v. Atkinson, 14 Id. 228.

[9] Brackenridge v. Holland, 2 Blackf. 377.

[10] Thorp v. McCullum, 1 Gilm. 614.

[11] Boyd v. Hawkins, 2 Ired. Eq. 304; Hunt v. Bass, 2 Dev. Eq. 292; Pitt v. Petway, 12 Ired. L. 69; Patton v. Thompson, 2 Jones' Eq. 285.

[12] Davis v. Simpson, 5 Harr. & Johns. 147; Richardson v. Jones, 3 Gill & J.

lina,[1] Alabama,[2] Mississippi,[3] Florida,[4] Tennessee,[5] Kentucky,[6] Missouri,[7] Michigan,[8] Wisconsin,[9] and Kansas.[10] In Kentucky, indeed, it is held that the sale itself, when the property is purchased by or for the trustee, is void.[11] And the rule was formerly laid down to the same extent in New Jersey,[12] but this was afterwards qualified, and the true rule stated to be that such sales are voidable, not void—that they may be avoided by *cestuis que trust* and their heirs, from whose acquiescence or ratification they may become valid; but that strangers or third persons cannot impeach or question them.[13] This qualification of the rule is now generally admitted, and has been expressly asserted in some cases.[14] In the case of Michoud v. Girod,[15] in the Supreme Court of the United States, the subject of purchase by executors and other trustees at their own sale, was examined at much

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163; Mason v. Martin, 4 Md. 124. In Spindler v. Atkinson (3 Md. 409), it was held that a trustee may purchase the trust property, levied on and sold at a sheriff's sale, at the instance of *others*, and he will be entitled to reimbursement for his expenditures in the purchase; but he cannot deprive the *cestui que trust* of the benefit arising from the purchase, if there be such benefit. In the same case, the general rule was recognized, that a person who undertakes to act for another, cannot in the same matter act for himself; but it was said to be not universally true that a trustee cannot purchase the trust estate; circumstances may render it necessary, in order to protect the interests of a *cestui que trust*. Id. ibid.

[1] Perry v. Dixon, Dessau. 594, note; Butler v. Haskell, Id. 654; Zimmerman v. Harman, 4 Rich. Eq. 165.

[2] Saltmarsh v. Beene, 4 Port. 283; Andrews v. Hobson's Adm'r, 23 Ala. 219.

[3] Scott v. Freeland, 7 Sm. & M. 409.

[4] Bellamy v. Bellamy's Adm'r, 6 Fla. 62.

[5] Armstrong v. Campbell, 3 Yerg. 201.

[6] Grider v. Payne, 9 Dana, 188, 190.

[7] Wasson v. English, 13 Mo. 176. A purchase of trust property by a trustee, at a very reduced price, carries fraud upon its face. Smith v. Isaac, 12 Id. 106; Ownby v. Ely, 58 Mo. 475.

[8] A sale made by a trustee or agent to himself is void in law. Clute v. Barron, 2 Mich. 192. See the opinion of Whipple, C. J., in this case.

[9] Geisse v. Beall, 3 Wis. 367.

[10] Dunlap v. Beckes, 23 Kans. 154.

[11] Grider v. Payne, *ubi supra*.

[12] Den v. Wright, 2 Halst. 175.

[13] Den v. McKnight, 6 Halst. 385; see Blauvelt v. Ackerman, 20 N. J. Eq. 141.

[14] Prevost v. Gratz, 1 Pet. C. C. 368; Harrington v. Brown, 5 Pick. 519, 521; Painter v. Henderson, 7 Barr, 48; McKinley v. Irvin, 18 Ala. 681; but see Michoud v. Girod, 4 How. 557.

[15] 4 How. 503, 556.

length, and the doctrine laid down in Davoue v. Fanning was fully recognized.

A trustee becoming the purchaser, at a sale of the trust property, cannot take advantage of the objection that he was trustee, in order to avoid the purchase.[1]

§ 414. *Disability, how Removed.*—If a trustee or assignee be desirous of purchasing the trust estate, or any part of it, he may be allowed to do so, on application of the court having jurisdiction.[2] But in order to accomplish this object he must be divested of the character of trustee, either temporarily or wholly.[3] In Connecticut, this has been effected, under the statute of assignments, by the appointment of another person to sell the estate or some part of it, upon giving bond to the court appointing him; and at any sale made by such person, the trustee may be a purchaser.[4] In England, an assignee may be removed at his own request, in order that he may bid at a sale of part of the bankrupt's estate.[5]

§ 415. *Conveyance by Assignee.*—It seems that an assignee for the benefit of creditors may convey land by attorney, though there be no special authority given in the assignment, to delegate his power. This opinion was held by Gibson, C. J., in the case of Blight v. Schenck.[6] But in Hawley v. James,[7] it was held by Chancellor Walworth, that a trustee who has only a delegated discretionary power, can-

[1] McClure v. Miller, 1 Bailey's Ch. 107.

[2] Campbell v. Walker, 5 Ves. Jr. 678, 681; Wayne, J., in Michoud v. Girod, 4 How. 557.

[3] Lord Eldon, in Ex parte Bennett, 10 Ves. Jr. 381, 394; Lewin on Trusts, 379.

[4] Gen. Stat. (Rev. of 1875), p. 395, § 40.

[5] Ex parte Perkes, 3 Mon. D. & De G. 385.

[6] 10 Barr, 285. By the Pennsylvania act of March 14, 1850, § 1, any trustee, executor, or other person acting in a fiduciary character, with power to convey lands or tenements in Pennsylvania, may make conveyance under such power by and through an attorney or attorneys duly constituted; and such conveyance shall be of the same validity as if executed personally by the constituent, and all conveyances as heretofore *bona fide* made by such trustees are confirmed. Laws of 1850, p. 195. Purdon's Dig. (Brightley, 10th ed.) p. 1425, § 69. A trustee of the legal title may convey by agent. Olney, J., in Telford v. Barney, 1 Iowa, 575. See Perry on Trusts, p. 411.

[7] 5 Paige, 318, 323, 487. This was a case of trusts created by will.

not give a general authority to another to execute such power, unless he is specially authorized to do so by the deed or will creating the trust; and that a general authority to an agent, to sell and convey lands belonging to the estate, or to contract absolutely for the sale of such lands, cannot therefore be given by the trustees. But they may intrust an agent with an authority to make conditional sales of land lying at a distance from the place of residence of the trustees, subject to the ratification of such trustees, or any two of them. And they may also empower him to make and execute valid conveyances of the land thus sold, upon a compliance with the terms of sale, after such sales have been so ratified by them.[1]

No covenant can be required of an assignee in a conveyance by him, except the ordinary covenant against his own incumbrances.[2]

It seems that assignees take as joint tenants, and must all unite in the execution of the trust, and especially in giving a deed to a purchaser of lands.[3]

§ 416. *Title of Purchaser.*—A *bona fide* purchaser for valuable consideration, without notice, under a deed of trust not void upon its face, cannot be affected by any intended fraud of the grantor in the deed of trust.[4] And a sale to a *bona fide* purchaser for value, by assignees for creditors, under a deed voidable for a defect apparent on its face, cannot

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[1] Cranston v. Crane, 97 Mass. 459; Gillespie v. Smith, 29 Ill. 473.

[2] Ennis v. Leach, 1 Ired. Eq. 416; Perry on Trusts, p. 421; White v. Folgambe, 11 Ves. 345; Onslow v. Londesborough, 10 Hare, 74; Worley v. Frampton, 5 Hare, 560; Stephens v. Hotham, 1 Kay & J. 571; Page v. Broom, 3 Beav. 36; Copper Mining Co. v. Beach, 13 Beav. 478; Hodges v. Blagrave, 18 Beav. 405; Phillips v. Evarard, 5 Sim. 102; Barnard v. Duncan, 38 Mo. 170. As to conveyances by surviving assignees, see Benedict v. Morse, 10 Metc. 223.

[3] Brennan v. Wilson, 71 N. Y. 502; s. c. 4 Abb. N. C. 279.

[4] Ewing v. Cargill, 13 Sm. & M. 79; Sheldon v. Striker, 42 Barb. 284; see Wood v. Augustine, 61 Mo. 46. But where the deed is fraudulent on its face, it is said the purchaser gets no title. Palmer v. Giles, 5 Jones' Eq. (N. Ca.) 75. If the grantor be present at the sale, and not objecting, he is bound by it, at least at law. Lamb v. Goodwin, 10 Ired. L. 320. A sale by the assignee of an insolvent corporation, made by him in good faith, is not invalidated by the fraud of a stockholder committed without the knowledge or privity of the assignee. Trevitt v. Converse, 31 Ohio St. 60.

be avoided by the insolvent trustee of the assignors, where the sale was made before an election by the trustee to disaffirm the assignment.[1] A *bona fide* purchaser of trust property from the trustee, without notice of the trust, will be protected in his purchase.[2] And notwithstanding the invalidity of an assignment, as it respects the creditors of the assignor, a sale of goods assigned, made by the assignee before the creditors have obtained a specific lien upon them, to an innocent purchaser for a valuable consideration, is valid. But where the assignee, after executions against the assignor had been delivered to the sheriff, sold the assigned property to two of four preferred creditors, in one lot, at a reduction of fifty per cent. from the prime cost, the amount of the purchase not being known to either of the parties at the time, and no money was paid by the purchasers, but they gave their note for the price of the goods as eventually ascertained; not, however, until after the goods had been levied on by the sheriff, under the executions—it was held that the purchasers were not entitled to be considered innocent purchasers for a valuable consideration.[3]

A purchaser has constructive notice of the trust from the registry of the deed, and where the trust remains unexecuted, and the property is still subject to the debts, he must not be content with the recital that the trust has ceased, but must ascertain, at his peril, whether such is the case.[4]

The maxim, *caveat emptor*, does not apply to the case of a sale by assignees for the benefit of creditors, whether the property be real or personal.[5] And where an assignee under a voluntary assignment for the benefit of creditors, sold at public sale a tract of land which had been purchased

[1] Okie v. Kelley, 12 Penn. St. 328.

[2] Henderson v. Dodd, 1 Bailey's Ch. 138; Christmas v. Mitchell, 3 Ired. Eq. 535. A purchaser for value from the grantee in a deed of trust for the benefit of creditors has a title superior to that of a donee in a deed of gift, though executed previous to the trust deed, but unaccompanied by possession. Ward v. Wooten, 74 N. Ca. 413.

[3] Pine v. Rickert, 21 Barb. 469.

[4] Briggs v. Davis, 20 N. Y. 15; s. c. 21 N. Y. 574.

[5] Lindemann v. Ingham, 36 Ohio St. 1.

by the assignor under articles of agreement duly recorded, and in the advertisement it was described generally as a tract of land belonging to the assignor—it was held that the purchaser at the assignee's sale was entitled to a deduction from the purchase money of the amount remaining due to the original owner.[1]

Where the creditors have neither released the debtor nor assented to the deed, he has such an interest in the sale of the property that if, at a sale made by his trustee, he stands by and sees property sold in which he knows that there is a latent defect, and does not disclose it, he makes himself liable to the purchaser in an action for deceit.[2]

If a *cestui que trust*, under an assignment for the benefit of creditors, buys a right of property which the assignees were empowered to sell, in the execution of their trust, he must claim as a purchaser under them, not as a *cestui que trust*.[3]

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[1] Adams v. Humes, 10 Watts, 305.
[2] Case v. Edney, 4 Ired. L. (N. Ca.) 98.
[3] Wilkinson v. Wilkinson, 2 Curt. 582.

CHAPTER XXXVI.

EXPENSES OF THE TRUST AND COMPENSATION TO THE ASSIGNEE.

§ 417. The payment of the *expenses* of the trust is usually provided for by the assignment; and these the assignee is authorized to deduct and retain out of the first moneys which come into his hands as proceeds of the assigned property. And even where they are not provided for in the assignment itself, all the necessary expenses of the assignee are to be reimbursed to him out of the estate.[1] In every instrument conveying an estate in trust, there is an implied direction that all such expenses as the preservation or protection of the estate may require, shall be incurred, and an implied stipulation or promise that when incurred, they shall be a charge upon the estate.[2]

The expenses of the trustee in the execution of the trust are a lien upon the estate, and he will not be compelled to part with the property until his disbursements are repaid.[3]

The principal items of expense or disbursement incurred in the execution of trusts created by voluntary assignments, are advertising, insurance,[4] interest,[5] taxes and assessments, commissions on sales, salaries and wages of persons employed as agents, clerks, &c.,[6] office and store rent, costs of suits to recover debts and property, costs of defending suits

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[1] Noyes v. Blakeman, 3 Sandf. S. C. 531; Miles v. Blakeman, 4 J. J. Marsh. 457; Lowe v. Morris, 14 Ga. 165; Clark v. Hoyt, 8 Ired. Eq. 222; Egbert v. Brooks, 3 Harr. (Del.) 110; Hill on Trusts (3d Am. ed.) [570] 861; Blow v. Gage, 44 Ill. 208.

[2] Duer, J., in Noyes v. Blakeman, 3 Sandf. S. C. 544; Lewin on Trusts, 450, 455.

[3] Perry on Trusts, 587; Ex parte James, 1 D. & C. 272; Hill v. Mogan, 2 Moll. 460; Ex parte Norwich Yarn Co. 22 Beav. 143; Ex parte Chippendale, 4 De G., M. & G. 19; Trott v. Dawson, 1 P. Wms. 78; Morrison v. Morrison, 7 De G., M. & G. 226.

[4] See *ante*, p. 333.

[5] See *ante*, p. 333.

[6] See *ante*, p. 334.

and fees of counsel for services in suits, or for advice in the general management of the trust.[1] But if an assignee allows the debtor to act as his agent, and receives large compensation therefor, he will have to account for the amount to creditors, on a bill filed on behalf of all of them.[2] In Pennsylvania, it has been held that an assignee may make a contract with counsel for the recovery of assets assigned, and an agreement with counsel to pay them one-half all that should be recovered was sustained.[3]

When the assignees make a charge for money paid out, they must prove that the estate was in some manner benefited by such payment, before the payment becomes a proper credit to the assignee.[4]

A trustee ought to keep a regular account of his expenses, and if he does not do so, every intendment of fact will be against him,[5] and the lowest estimate put upon his charges for expenses.[6]

A trustee is entitled to be reimbursed his expenses, though the trust be subsequently declared void, if he have acted in good faith.[7] But in a case in New York, where

[1] Noyes v. Blakeman, 3 Sandf. S. C. 531; Jewett v. Woodward, 1 Edw. Ch. 195, 200; see In re Noyes 6 N. B. R. 977; In re Davenport, 3 Id. 77; In re Tully, Id. 82; In re Warshing, 5 Id. 350; see Hill on Trusts (3d Am. ed.) [551] 825; Id. [565] 845, note 1; Perry on Trusts, c. 30; Duffy v. Duncan, 35 N. Y. 187; Matter of Scott, 53 How. Pr. 441; Matter of Thomas, 5 Abb. N. C. 344; Collier v. Munn, 41 N. Y. 143; Levy's Accounting, 1 Abb. N. C. 177. A trustee should be allowed the costs and expenses of suits and arbitrations, expended in good faith in the concern of the trust; but not those incurred after he has been called upon, by his *cestui que trust*, to surrender the trust, and has refused. Towle v. Mack, 2 Vt. 19.

As against the proceeds of attached property, expenses incurred in resisting the attachment suit are proper allowances. McLain v. Simington, 37 Ohio St. 660.

In Ingham v. Lindemann (37 Ohio St. 218), the assignee was not allowed his expense in employing an auctioneer, no authority from the court being shown.

It is not necessarily sufficient to entitle trustees to their costs of a suit, that they have acted under the advice of counsel. Devey v. Thornton, 12 Eng. Law & Eq. 197.

[2] Redmond v. Wemple, 4 Edw. Ch. 221.

[3] McLellan's Appeal, 26 Penn. St. 463.

[4] Duffy v. Duncan, 35 N. Y. 187.

[5] Perry on Trusts, p. 541; Ex parte Caswell, 5 Watts, 442; Green v. Winter, 1 Johns. Ch. 27.

[6] McDowell v. Caldwell, 2 McCord's Ch. 42.

[7] Hawley v. James, 16 Wend. 61; In re Wilson, 4 Barr, 430; Stewart v. McMinn, 5 W. & S. 100; see Bishop v. Hart's Trustees, 28 Vt. 71.

In Hunker v. Bing (9 Fed. Reptr. 277), it was held that an assignee under a

trustees of an invalid trust, who unreasonably defended it, were cognizant of all the transactions out of which its invalidity arose, they were decreed to bear their own costs.[1]

§ 418. *Compensation to Assignee.*—In addition to the allowance of his expenses and disbursements, the assignment sometimes contains a provision allowing the assignee a compensation for his own time and services; and this is either fixed at a certain amount in the shape of an annual salary,[2] a gross sum,[3] or commissions,[4] or stipulated for in general terms, leaving the amount to be settled upon the principle of a *quantum meruit;* and sometimes a compensation is stipulated for by agreement, independently of the assignment.

Where there is no express stipulation or agreement for compensation to the assignee, beyond his expenses, the rule in some States is, that he is entitled to none; while in other States, he is held to be entitled to a reasonable compensation, whether there be any provision or agreement to that effect or not. The general rule of equity as held in England, is that trustees are not entitled to commissions or compensation for their services, in the execution of their trusts, where no provision was made therefor in the instrument creating the trust.[5] This rule was formerly adopted to its full extent by the Court of Chancery of New York.[6]

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void assignment will not be reimbursed his expenses incurred under the assignment, nor is he entitled to compensation, as assignee, for services. But for such services and disbursements as benefit the general body of creditors, either by reason of the preservation of the fund to their use by advantageous collections of assets or by conversion of the property into money, he will be allowed what is reasonable and just. Payments made by him to an attorney will be governed by the same rule.

[1] Leavitt v. Yates, 4 Edw. Ch. 134. But see, as to the validity of the trust, the case of Curtis v. Leavitt, 15 N. Y. 9.

[2] Vernon v. Norton, 8 Dana, 247.

[3] Andrews v. Ludlow, 5 Pick. 28; see Winn v. Crosby, Daily Reg. Dec. 14, 1876; Lewin on Trusts, 443.

[4] Barney v. Griffin, 2 N. Y. 365; Donelson's Adm'rs v. Posey, 13 Ala. 752.

[5] Lewin on Trusts, 438, 443. For the reason of this rule, see Id. ibid.; and see Manning v. Manning, 1 Johns. Ch. 527: Hill on Trustees [574] 857; Perry on Trusts, p. 535, § 904. For a statement of the rules in various States governing the compensation of trustees, see Perry on Trusts, § 918.

[6] Manning v. Manning, 1 Johns. Ch. 527; see the opinion of Walworth, C., in

But in the case of Meacham v. Sternes,[1] in which the subject was fully considered by the chancellor, with reference to the act of April, 1817,[2] and the provisions of the Revised Statutes,[3] allowing commissions to executors, administrators and guardians, it was considered to be settled that in all cases of express trusts, where nothing is said in the deed or instrument creating the trust, on the subject of compensation to the trustee for his personal services in the execution of the trust, and where there is no agreement on the subject for a different allowance, the trustee, upon the settlement of his accounts, will be allowed the same fixed compensation for his services, by way of commissions, as are allowed by law to executors and guardians, and to be computed in the same manner. In other words, the court will consider the statutory allowance to executors, administrators and guardians, as the compensation tacitly understood and agreed on by the parties to all trusts of a similar nature, where nothing appears to show a different agreement or understanding on the subject of compensation.[4] Where the instrument creating the trust, however, fixes a different compensation,[5] or declares that none is to be allowed, or where the trustee, previous to the acceptance of the trust, makes a valid and binding agreement with the *cestui que trust*, as to the rate of

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Meacham v. Sternes, 9 Paige, 398–403; and see Jewett v. Woodward, 1 Edw. Ch. 195.

[1] 9 Paige, 398.

[2] Laws of 1817, p. 292.

[3] 3 R. S. (7th ed.) p. 2303.

[4] In Duffy v. Duncan (35 N. Y. 187), where commissions at the rates payable to executors were allowed, it was suggested that commissions allowed at the rates provided for trustees in proceedings in relation to concealed and absconding debtors might be sustained. The commissions allowed in such cases are at the rate of five per cent. on the whole sum which comes into the hands of the trustee. See 3 R. S. (7th ed.) p. 2271, § 29; and *post*, § 423.

[5] In Keteltas v. Wilson (36 Barb. 298), it was said: "Compensation at a fixed sum, provided it should not exceed what the laws of the State allow to executors or administrators, and if it should exceed that amount, then at the rate so prescribed for executors and administrators, limits, and does not enlarge their legal claims, and is unobjectionable." And as to what provisions in an assignment for the payment of the expenses and commissions of the trustee are illegal, see *ante*, p. 340.

compensation to be allowed for his services in the execution of the trust—that, of course, must prevail. And where such instrument contains an express provision that the trustee shall receive a compensation for his services, in addition to his expenses and disbursements, leaving the amount to be settled upon the principle of a *quantum meruit*, the amount of compensation must necessarily depend, to a certain extent, upon the peculiar circumstances of each case, and must be adjusted with reference to what is usually paid by the agreements of parties for similar services.[1]

§ 419. In Connecticut, also, it has been held, that although it is a general rule of equity that a trustee is not to receive compensation except for time and expenses, unless it be stipulated by the parties to be paid, yet, where the assignee of the stock of a manufacturing company, in trust to work it up, and from the avails to indemnify himself for his responsibilities for such company, accepted the trust, under an agreement with one of the partners, who was agent of the company, that he should be allowed the same compensation to which he would have been entitled if he had not been trustee; and it appeared that he conducted the business with good faith, and without unnecessary delay; that his services were highly important to the company and all concerned, and without them the consequences would have been ruinous—it was held that certain sums charged in his account, as commissions on his responsibilities, which were found to be, all things considered, only a reasonable compensation, ought to be allowed.[2] In the same State, by the statute regulating assignments, "the expenses of executing the trust and settling the estate," are to be paid first in the order of distribution, as made under the direction of the Court of Probate.[3]

In California, it is provided that, in the absence of any

[1] Walworth, C., in Meacham v. Sternes, 9 Paige, 403, 404.
[2] Kendall v. New England Carpet Company, 13 Conn. 383.
[3] Gen. Stat. (Rev. of 1875), p. 386, § 84.

provision in the assignment to the contrary, an assignor for the benefit of creditors is entitled to the same commissions as are allowed by law to executors and guardians; but the assignment cannot grant more, and may restrict the commissions to a less amount, or deny them altogether.[1]

§ 420. In Delaware, the general equity rule appears to prevail without qualification, that a voluntary trustee, not stipulating for compensation, is not entitled to any compensation for his time and trouble; that he is entitled to have his expenses and charges paid, and to be indemnified against expenses and loss; but not to be remunerated.[2]

In Pennsylvania,[3] and Maryland,[4] on the other hand, by an equitable construction of the statutes allowing commissions to executors, guardians and trustees, commissions may be allowed to conventional trustees, although there was no agreement to that effect.[5] And in Pennsylvania, the rule is now established that all trustees are entitled to a reasonable compensation for their services as they are rendered, and unless a contrary intention appear, the compensation must come out of the fund with which they are intrusted.[6] The same rule seems to prevail in Vermont,[7] Kentucky,[8] and Michigan.[9]

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[1] Civil Code, § 3471; Hitt. § 3471; Menke v. Miller, 56 Cal. 628.

[2] Egbert v. Brooks, 3 Harr. 110; The State v. Platt, 4 Id. 154; The State v. Rogers, Id. ibid.

[3] Prevost v. Gratz, 3 Wash. C. C. 484.

[4] Ringgold v. Ringgold, 1 H. & G. 11.

[5] Id. ibid; see Winder v. Diffenderffer, 1 Bland, 166; Bentley v. Shreve, 2 Md. Ch. Dec. 215.

[6] Spangler's Estate, 21 Penn. St. 335; Heckert's Appeal, 24 Id. 482. The general rule is to allow compensation by commissions, and five per cent. is the ordinary rule. Pusey v. Clemson, 9 S. & R. 209; Burkholder's Appeal, 94 Penn. St. 522; Perry on Trusts, § 908, note. In Brice's Appeal (95 Penn. St. 145), the fund arising from the sale of real estate by the assignee amounted to $16,535. It was held that in the absence of any especial trouble two and one-half per cent. commissions were properly allowed.

[7] Hubbard v. Fisher, 25 Vt. 539.

[8] Phillips v. Bustard, 1 B. Mon. 348; but see McMillen v. Scott, 1 Mon. 150; Miles v. Bacon, 4 J. J. Marsh. 457; Lane v. Coleman, 8 B. Mon. 581.

[9] Schwartz v. Wendell, Walk. Ch. 267.

In Ohio,[1] before any dividend is declared, the assignee or trustee may be allowed the following commission upon the amount of the personal estate collected and accounted for by them, and of the proceeds of the real estate, sold under an order of court for the payment of debts, which shall be received in full compensation of all his ordinary services, that is to say:

For the first thousand dollars at the rate of six per centum; for all above that sum, and not exceeding five thousand dollars, at the rate of four per centum. And for all above five thousand dollars, at the rate of two per centum. And in all cases such further allowance shall be made as by the court shall be considered just and reasonable for his actual and necessary expenses, and for any extraordinary expenses, or for any extraordinary services not required of an assignee in the common course of his duty; also, such reasonable counsel fees as may be necessary for the proper administration of said assignment, whether performed by the assignee or trustee as attorney, or such other as may be employed by him; but that no such further allowance, extraordinary expenses or services, or attorney fees, shall be allowed by the court, unless a bill of items be filed showing such actual and necessary or extraordinary expenses and services, or attorney fees, together with the affidavit of the person incurring such expenses or performing such services, showing that the same were performed for and were necessary to the assignment, and that the amount charged therefor is reasonable, and not more than is usually paid for such services; and when such services shall have been performed by persons other than the assignee or trustee, the assignee or trustee shall also file an affidavit stating that such services were necessary for the proper administration of the assignment, that they were performed under his direction, that the charges for the same are fair and reasonable, and that the

[1] R. S. of Ohio (1880), § 6357; see Gilbert v. Sutliff, 3 Ohio, N. S. 129, for the rule before the statute; see also Ingham v. Lindemann, 37 Ohio St. 218; McLain v. Simington, Id. 660.

full amount thereof has been paid to the party performing such services.

§ 421. In Maine, assignees are allowed by statute a reasonable compensation for their services, to be paid out of the estate.[1] And in New Jersey,[2] and Illinois,[3] they are entitled by statute to such commissions and allowances as the court before whom their accounts are settled may consider just and right.

In North Carolina, it seems to have been formerly held that a trustee was entitled to no compensation for his services, unless there was some understanding to that effect when the trust was created.[4] But this opinion was afterwards modified,[5] and the rule is now settled that a trustee is entitled to commissions as compensation for his labor in managing the trust committed to him, though no provision be made for it in the deed of trust.[6]

In South Carolina assignees and agents of the creditors, under an assignment, are entitled to commissions by statute.[7] And in Georgia all trustees are by statute entitled to compensation for their services, and commissions are allowed them.[8] A similar rule has been judicially established in Alabama.[9]

In the case of Jenkins v. Eldridge,[10] in the Circuit Court of the United States for Massachusetts, Mr. Justice Story considered it to be "the general practice in America," and especially in Massachusetts, to allow commissions to trustees in cases of open and admitted express trusts, where the trustees have not forfeited them by gross misconduct. And in

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[1] Rev. Stat. (ed. 1871), p. 545, c. 70, § 11.

[2] Rev. Stat. (ed. 1878), p. 40, § 18. [3] R. S. (Cothran, 1881), p. 119, § 6.

[4] Boyd v. Hawkins, 2 Dev. Eq. 195.

[5] See Boyd v. Hawkins, 2 Dev. Eq. 329.

[6] Sherrill v. Shuford, 6 Ired. Eq. 228; Ingram v. Kirkpatrick, 8 Id. 62.

[7] Burckmyer v. Beach, 7 Rich. Eq. 487, referring to the statute of 1838; Loller v. Croft, 9 Rich. Eq. 474.

[8] Lowe v. Morris, 13 Ga. 165; Williamson v. Wilkins, 14 Id. 416; Burney v. Spear, 17 Id. 228, referring to the statute of 1764.

[9] Gould v. Hayes, 19 Ala. 438; Gould v. Hayes, 25 Id. 429.

[10] 3 Story, 325, 332.

the case of Barney v. Saunders,[1] in the Supreme Court of the United States, it was held that trustees in this country are entitled to claim from courts of equity a fair compensation for their services.

In New York, a trustee has been held entitled to commissions upon sums with which he is charged, in consequence of losses arising from his negligence, and on debts due to himself as one of the *cestuis que trust*, and also on the balance in his hands which he is directed by decree to pay over to the *cestuis que trust*.[2] And in a case where a trustee died, without having collected certain claims assigned to him, and they were collected by his administratrix, it was held that she was entitled to the commissions.[3]

§ 422. *Allowance of Compensation.*—The compensation of the assignee is to be ascertained and awarded by the proper court upon the rendering of his account.[4] He is not allowed to become a judge of the value of his own services, and offset money or goods appropriated from the estate against the same in gross, without specification and detail, even where a compensation is provided.[5] In Maine, the allowance is determined by the judge of probate, subject to the right of appeal to the Supreme Court of Probate.[6] In New Jersey, the commissions and charges of assignees are adjusted in the final settlement of their accounts before the Orphans' Court of the county.[7]

§ 423. *Amount of Compensation.*—In New York, the court may, in its discretion, award reasonable counsel fees and costs, determine which party shall pay the same, and make all necessary rules to govern the practice under the act. "The assignee or assignees named in any assignment, shall

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[1] 16 How. 535.

[2] Meacham v. Stearns, 9 Paige, 398, 399.

[3] Depeyster v. Ferrers, 11 Paige, 13.

[4] Geisse v. Beall, 3 Wis. 367; Gilbert v. Sutliff, 3 Ohio, N. S. 129; Heckert's Appeal, 24 Penn. St. 482.

[5] Geisse v. Beall, *ubi supra*.

[6] Rev. Stat. (ed. 1871), p. 545, c. 70, § 11; see *ante*, p. 32.

[7] Rev. Stat. (ed. 1878), p. 40, § 18.

receive for his or their services a commission of five per centum on the whole sum which will have come into his or their hands."[1]

Previous to this statute, there was no statutory provision in New York fixing the compensation of assignees, but it had long been settled in practice that they were to be allowed the same rates as those prescribed by statute for executors and administrators.[2]

These are, on all sums of money received and paid out, not exceeding one thousand dollars, *five* per cent.; on all sums exceeding one thousand dollars, and not amounting to ten thousand dollars, *two and a half* per cent.; and on all sums above ten thousand dollars, *one* per cent.[3] And these rates are so far settled, that the debtor cannot, by the assignment, provide for paying the assignee a higher one.[4] And in a case where a commission of six per cent. was allowed on the gross amount of moneys received and paid out by the assignees, it was considered to be void to the extent of the excess.[5] In North Carolina, a commission of two and a half per cent. for making the sale and disbursing the proceeds, has been considered as not too large.[6] In a case in the same State, where a master, in his report, allowed a trustee noth-

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[1] Laws of 1878, c. 318, amending Laws of 1877, c. 446, § 26; 3 R. S. (7th ed.) p. 2281.

The assignee is not entitled to commissions on the value of mortgaged property, but only on what was received therefor. Matter of Dean, 86 N. Y. 398. Where an assignee took possession, and had converted part of the estate into cash, and the insolvent then effected a composition with his creditors, it was held that the assignee was entitled, upon his accounting, to commissions, which should be computed upon the amount of money which came into his hands, and not upon the value of the entire assigned estate. Matter of Hulbert, 10 Abb. N. C. 452; modifying s. c. Id. 284; which reversed s. c. 9 Id. 132.

[2] Hunker v. Bing, 6 Fed. Reptr. 277; In re Scott, 53 How. Pr. 441; Meacham v. Sternes, 9 Paige, 398; Matter of Shaw, 18 Hun, 195; see Duffy v. Duncan, 35 N. Y. 187; Matter of Schell, 53 Id. 263; Keteltas v. Wilson, 36 Barb. 298; Wynkoop v. Shardlow, 44 Id. 84; Campbell v. Woodworth, 24 N. Y. 304; Eyre v. Beebe, 28 How. Pr. 333.

[3] 3 Rev. Stat. (7th ed.) p. 2303; but see Duffy v. Duncan, 35 N. Y. 187, cited *ante*, p. 636.

[4] Barney v. Griffin, 2 N. Y. 365, 372; but see Wynkoop v. Shardlow, 44 Barb. 84.

[5] Bronson, J., Barney v. Griffin, 2 N. Y. 365, 372.

[6] Ingram v. Kirkpatrick, 8 Ired. Eq. 62.

ing for his expenses, but a greater amount of commission than had been stipulated by the parties, and, upon the whole, the trustee appeared to have received no more than a fair compensation, the court refused to disturb the report.[1] In Alabama, it has been held, that where the trustee in a deed of trust was to receive twelve and a half per cent. by the terms of the deed, this was not sufficient to avoid it in the absence of proof that such compensation was unconscionable.[2]

In a case in Kentucky, where an assignment was made to two trustees, and a salary of three hundred dollars was stipulated to be paid to each of them annually, it was held to be unobjectionable.[3] And a provision for the payment of large salaries has been held not to make the deed fraudulent on its face.[4] But where each of the trustees was to receive eight thousand dollars per annum, the assignment was, for this and other reasons, held void as against creditors not parties.[5]

Compensation by the allowance of a gross sum to the assignee, is the least frequent form in which it is provided by the debtor. In a case in Massachusetts, where there were two assignees, the allowance of one thousand dollars as a compensation for the services of both, was not objected to.[6]

§ 424. In regard to fees claimed by the assignee for services rendered as *counsel*, it has been held in South Carolina, that a trustee cannot charge the estate with a counsel fee paid to himself.[7] And in New York it has been held that a provision in an assignment authorizing the payment of "a reasonable counsel fee" to the assignee, in

[1] Clark v. Hoyt, 8 Ired. Eq. 222.

[2] Donelson's Adm'rs v. Posey, 13 Ala. 752. As to the general rule in this State, see Gould v. Hays, 25 Ala. 426.

[3] Vernon v. Morton, 8 Dana, 247.

[4] Ingraham v. Grigg, 13 Sm. & M. 22.

[5] Bodley v. Goodrich, 7 How. 276.

[6] Andrews v. Ludlow, 5 Pick. 28.

[7] Mayer v. Galluchat, 6 Rich. Eq. 1.

addition to the expenses, costs, and commissions of executing the trust, was an appropriation of the assigned property to an illegal purpose, and rendered the assignment void as to creditors; and that, so far as the validity of such a provision was concerned, it was immaterial whether the assignee was or was not an attorney and counsellor at law.[1] The court regarded the rule as well settled, that an insolvent assignor cannot give to his assignee any portion of his estate for his services, beyond the fixed legal rate of compensation.[2] In Mississippi, the sound and just rule on this subject is now held to be, that although compensation may be allowed to a trustee who performs such service for the estate in his hands, as an attorney or solicitor, yet it shall never be allowed unless it be clearly shown, beyond a doubt, that the legal proceedings were undertaken and conducted in good faith, and with an eye single to the best interests of the estate, and were necessary to protect its rights.[3]

§ 425. *Compensation, when Forfeited.*—Compensation to an assignee, in any form, is always on the supposition and condition that he performs the duties incumbent on him under the assignment. Hence, if he is guilty of gross carelessness,[4] or misconduct,[5] or violates the trust,[6] no compensation will be allowed him. And if he maladminister and refuse to account, both compensation and expenses may be refused him.[7]

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[1] Nichols v. McEwen, 21 Barb. 65; s. c. 17 N. Y. 22; and see Heacock v. Durand, 42 Ill. 230; see *ante*, p. 340, n. 6.

[2] Nichols v. McEwen, 17 N. Y. 22; and see Winn v. Crosby, 52 How. Pr. 174.

[3] Shirley v. Shattuck, 28 Miss. 18.

[4] Stehman's Appeal, 5 Barr, 313.

[5] Jenkins v. Eldredge, 3 Story, 325, 332.

[6] Flagg v. Mann, 3 Sumn. 84.

[7] Gilbert v. Sutliff, 3 Ohio, N. S. 129; and see Barney v. Saunders, 16 How. 535. In a case in the Circuit Court of the United States for the District of Rhode Island, where an assignment made by an insolvent debtor was held voidable, as actually fraudulent as against creditors, and the assignee either had knowledge of the extraneous facts which rendered the assignment voidable by creditors, or the means of knowing them, and was put upon inquiry—it was held that he had no lien, as against an attaching creditor, upon proceeds of the property assigned, for his services in partially executing the trusts, or for retainers paid to counsel. Hastings v. Spencer, 1 Curt. 504.

CHAPTER XXXVII.

DISTRIBUTION AMONG CREDITORS.

After deducting out of the proceeds of the sales and collections, the expenses incident to the trust, and the amount of compensation provided for himself by law, or by the terms of the assignment, it is the duty of the assignee to *distribute* without delay the surplus moneys in his hands, among such of the creditors as may be entitled, either according to the provisions of the assignment, or according to the general provisions of law, where they control those of the assignment. This may be considered the most important proceeding in the whole course of executing the trust; to which the principal processes of collection and sale, with their attendant proceedings, are only preliminary and instrumental. Distribution to creditors comprises the whole object and end of the assignment.

§ 426. *Distribution, how Made.*—The distribution is made either in one payment, or (which is more usual) in successive payments or *dividends*, as moneys come to the hands of the assignee, of which notice is given to the creditors. But before it can take place, an essential preliminary on the part of the assignee is to ascertain what creditors are entitled to payment or dividend, the *amount* of the debts, and the *order*, if any, in which they are payable.

And the assignee ought to take into account the subrogated rights of a surety of the assignor, who may have paid any of the creditors in whole or in part.[1]

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[1] Motley v. Harris, 1 Lea (Tenn.), 577; see Stamford Bank v. Benedict, 15 Conn. 437. The indorser of a promissory note, though fixed in his liability by protest, is entitled to rank as a *creditor* only for the amount actually paid by him. Farmers' Bank v. Gilpin, 1 Del. Ch. 409. A wife may rank *pro rata* with the other creditors if her claim is free from collusion and fraud. Ziegler's Appeal, 84 Penn. St. 342.

§ 427. *What Creditors are Entitled.*—Care should be taken by the assignee, that payment is made to such creditors only as are entitled to it under the assignment; and it will be no defense to an action brought against him by a preferred creditor, that he had, through a misapprehension of his duties, or a mistaken construction of the instrument, paid over all the money to other creditors.[1]

And in an action brought against him by a creditor whose claim has been judicially allowed, it will not be sufficient for him to plead a re-assignment at the request of a majority of the creditors.[2]

Where the assignment is upon certain express terms, as where it is made for the benefit of such creditors as shall become parties to it or release the debtor, these terms must be complied with by creditors who claim the benefit of it.[3]

Where the assignment is explicit as to the debts to be paid, and the amount of each, and (in cases of preference) the order of payment, it will, in general, be a sufficient guide to the assignee. In Missouri it has recently been held that the assignment is *prima facie* evidence that the persons named therein as creditors are really such.[4] And in the absence of any proof to the contrary, the assignee will, in some cases, be justified in paying according to the description of the debt in the deed, even if it be a mistaken one.[5]

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[1] Ward v. Lewis, 4 Pick. 518. It would be very imprudent for an assignee to assume the validity of merely equitable claims claimed by creditors. Cooper v. Kramer, 31 N. J. Eq. 420.

[2] Lamb v. Johnson, 32 Ohio St. 590.

[3] Lea's Appeal, 9 Barr, 504; Jewett v. Woodward, 1 Edw. Ch. 195; see Meyer's Appeal, 78 Penn. St. 452; Zaring v. Cox, 78 Ky. 527.

[4] Gates v. Labeaume, 19 Mo. 17; see Henry v. Murphy, 54 Ala. 246.

[5] So, in a case in Wisconsin, where a preferred creditor gave to the plaintiff an order on the defendant (assignee) for the amount of his claim as stated in the assignment, and the defendant accepted the order, it was held that the assignee was estopped by the representations made in the assignment from denying the indebtedness to the creditor and setting up a defense to the order. Gundry v. Vivian, 17 Wis. 437.

And on the other hand, where a second class creditor directed the trustee to withhold from collection an amount sufficient to pay him, which was done, and the note so retained became worthless, it was held that such creditor was not

Thus, in North Carolina, it has been held that where a debt intended to be secured by a deed of trust, is not correctly described in the deed, though the creditor, by identifying it, may recover it out of the trust fund, while that remains, yet, if the trustee has, *bona fide*, paid out the trust fund to discharge other debts, without any notice of the mistake by the creditor to the trustee, the creditor cannot make the trustee personally responsible.[1] But where evidences of the debts directed to be paid are held by the creditors, the assignee should always require the production of such evidences, before payment; otherwise he may render himself personally liable. Thus, in Pennsylvania, in a case where an assignment provided, among other things, for the payment "of all the creditors of the assignor, to whom J. S. may have become liable by acceptance, &c., viz.," and then followed a list of those liabilities, including *eight* drafts particularly described, and the assignees paid the whole of the alleged eight drafts, without requiring their production, and it afterwards appeared that there were only *six* drafts, and that two were inserted by mistake, it was held that the assignees were not entitled to credit, in their account, for the mispayment.[2]

Where the trust is for the payment of the grantor's debts generally, it will extend only to debts which existed at the time when the deed was made. A debt subsequently originating is not entitled to payment out of the trust estate.[3] If contingent liabilities are provided for, they must be such as existed when the conveyance was executed, and should be at least such as would entitle a party under the provisions of the English bankrupt act or our insolvent laws, to a share in the insolvent or bankrupt estate.[4]

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entitled to a *pro rata* share of the money collected for the benefit of the second class creditors, and that the trustee was not liable therefor. Bason v. Harden, 72 N. Ca. 287.

[1] Allemand v. Russell, 5 Ired. Eq. 183; and see further on, under this head, *ante*, § 146.

[2] Case of Stevenson's Assignees, 7 Watts, 480; see Bason v. Harden, 72 N. Ca. 287.

[3] Rome Ex. Bank v. Eames, 4 Abb. Ct. App. Dec. 83. [4] Id. 92.

And where a note was made the day after the assignment was executed and delivered, it was held that it could not be included in the assignment, nor could the assignor, by antedating the note, vary the effect of the instrument.[1]

A judgment recovered against an assignor after his assignment on a previous cause of action, is *prima facie* evidence of the facts which it adjudicates, as against the creditors who take under the assignment; such a judgment is *prima facie* entitled to a dividend.[2]

Where there is difficulty in ascertaining from the assignment the amount of debts payable, and the mode and order of payment, or where there are conflicting claims which it is difficult to adjust, the assignee may apply to the proper court for directions. This was done in New York, in the important case of Pratt v. Adams,[3] in which the assignees filed their bill against the assignor (Benjamin Rathbun), and against several hundreds of other persons and banking corporations who were supposed to be his creditors, for the purpose of having the debts due to the creditors ascertained, and their several priorities established, so that the proceeds of the assigned property might be distributed among the several persons interested therein, under the assignment, according to their respective rights. The case was referred to one of the masters of the court, to take and state an account, and report the order of priority in which the claims against the assignor were payable; and on the coming in of his report, the necessary decree was made by the court.[4]

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[1] Sheldon v. Smith, 28 Barb. 594, 600; see Power v. Alger, 3 Abb. Pr. 284, 475.

[2] Pitts. & Steubenville R. Co.'s Appeal, 3 Grant (Penn.), 68. The distributees might have attacked the claim by showing fraud or collusion. Id. p. 69.

[3] 7 Paige, 615. The creditors in this case were arranged by the assignment in two classes, the first constituting the preferred class. Independently of specific liens upon the assignor's real estate, amounting to more than half a million of dollars, claims were presented to and allowed by the master, to an amount exceeding a million of dollars, of which amount $380,939 was allowed by him as belonging to the class of preferred debts under the assignment. And claims to the amount of $225,000, which were attempted to be established, were rejected by him as usurious and void. Id. 624, 625.

[4] It may not be unimportant to state more particularly the course of proceedings in this case, after the filing of the complainants' bill. Many of the defendants were proceeded against as absentees, and the bill was taken as confessed against

The application on the part of the assignee to the court for instructions and authority to settle disputed claims may be either by motion or by bill in equity,[1] but in either case the application must be on notice to all parties interested in the estate, or the order or decree will be ineffectual to protect the assignee.[2]

In inquiring for the debts made payable out of the fund in his hands, the assignee or trustee (as already stated) looks, in the first instance, to the description of them in the assign-

them and many others, for want of appearance. And an arrangement was made between the complainants and those defendants who had caused their appearance to be entered, by which the bill was to be taken as confessed as to them also; reserving to each creditor all his rights on the reference to be made to a master, in the same manner as if he had come in and claimed such rights by his answer. A decree was then entered referring it to one of the masters of the court: 1. To take and state an account of all property, money and effects which had come to the hand of the complainants, as assignees, &c.; 2. To take and state an account of all payments and disbursements made by them, &c.; 3. To take and state an account of all expenses incurred by them, &c., and of all just allowances to be made to them for their services in the execution of the trust; 4. To take and state an account of all the claims and demands against the debtor, &c.; 5. To inquire into and report the order of priority in which the said claims and demands were entitled to be paid, and the facts and circumstances necessary to determine the said order—besides many other special directions as to the proceedings. See 7 Paige, 619–621; and Wylie's Appeal, 92 Penn. St. 196.

[1] In the case of Codwise v. Gelston (10 Johns. 521), Chancellor Kent remarked: "It may be difficult to draw a precise line between cases in which a party may be relieved upon petition, and in which he must apply more formally by bill. Petitions are generally for things which are matters of course, or on some collateral matter which has reference to a suit in court. The mode of application depends very much upon the discretion of the court."

[2] In the case of Anon. v. Gelpcke, (5 Hun, 245), Mr. Justice Daniels observes: "To render them controlling and obligatory in that class of cases, not only notice, but an opportunity to oppose the application to be made, are both matters of vital necessity (Stone v. Miller, 62 Barb. 431; People v. Soper, 7 N. Y. 428, 431), and trustees have been required to observe this principle in the applications which they have found it necessary to make for their guidance in doubtful cases. In the Matter of Christ's Church in Londonderry (5 N. H. 434), the petition was presented on notice. Wheeler v. Perry (18 N. H. 307), and Dimmock v. Bixby (20 Pick. 368), were by bill. See Freeman v. Cook, Burrill on Assign. (2d ed.) 557." So, where one of two assignees, without notice to his co-assignee or to any of the creditors, applied to the court on petition for leave to compromise a claim which appeared to be valid and good, and did not disclose all the circumstances, nor the fact that his co-assignee was opposed to the settlement, and obtained an order authorizing him to settle for 25 cents on the dollar—in the final accounting by the assignees, it was held that this order was no protection, and the assignee must sustain the loss.

So, also, a judgment in an action brought by a creditor, not preferred, against a trustee, for the sale of trust property, and exclusive payment to him, is not conclusive as against other creditors, not made parties to the action; and such active creditor may be held liable for their proportion of the proceeds. Smith v. Cunningham, 2 Tenn. Ch. 565. Probably the trustee himself ought to give notice of such an action to the other creditors. Pennebaker v. Tomlinson, 1 Id. 111.

ment, or its accompanying schedules,[1] which are regarded as a part of it, so far as they designate the creditors and the amount and nature of the debt.[2] But such description, as we have seen, is not always to be implicitly relied on, and when given by way of recital in a trust deed, has been held not conclusive, even as against the grantor and his administrator, of the amount of the respective debts.[3] And under the circumstances, the books of the grantor in the deed of trust were held to be proper evidence of the amount of the debts due to the creditors secured by the deed.[4] And the creditors have sometimes been allowed to introduce proof explanatory of the deed. Thus, in a case in Virginia, a creditor was allowed to show by proofs that his debt was intended to be secured under the provision for another creditor.[5] And in a case in Alabama, parol evidence was held admissible to show that a particular bill of exchange was intended to be secured by a deed of trust, though generally or improperly described in the deed.[6]

§ 428. *Doubtful and Disputed Claims.*—Doubtful claims are sometimes paid by assignees after taking an indemnity for their own security. In a case where an assignee paid in this way a judgment preferred by the assignment, it was held that such payment did not preclude the other creditors from contesting the validity of the judgment.[7]

[1] See the observations of Ruffin, C. J., in Allemand v. Russell, 5 Ired. Eq. 183, 186.

[2] Terry v. Butler, 43 Barb. 395; Kavanagh v. Beckwith, 44 Id. 192.

[3] Griffin's Ex'r v. Macaulay's Adm'r, 7 Gratt. 746.

[4] Id. ibid. Kavanagh v. Beckwith, *supra.*

[5] Id. ibid.

[6] Posey v. Decatur Bank, 12 Ala. 802. And see further on this subject, *ante*, pp. 462 *et seq.*, and *post*, Chap. XLII.

[7] Johns v. Erb, 5 Barr, 232; and see Meacham v. Sternes, 9 Paige, 398. "A trustee cannot be expected to incur the least risk in the distribution of trust funds; therefore when there is a mere shadow of doubt as to the rights of the parties, he may require a bond of indemnity. Such a bond, however, is not very satisfactory, as the obligors may decease and their property be divided long before there is a call upon them to indemnify the trustee, and if it appears that the trustees have committed a breach of trust under cover of such a defense, the court shows no mercy. Therefore, if a third person makes a claim, or if he refuses to state whether he has a claim when the trustee has a right to know, the trustee may bring such person before the court by bill." Perry on Trusts, § 928.

How far the holders of *usurious* claims against the assignor are entitled to payment out of the proceeds of the assigned property, has been a subject of considerable discussion in the courts of New York. In the case of Beach v. The Fulton Bank,[1] in the Court of Errors, it was held that trustees (some of whom were also creditors), under a deed of assignment for the benefit of creditors, might set up the defense of usury against claims presented to them, though the court inclined to think they were not bound to do so.[2] In the case of Pratt v. Adams,[3] in the Court of Chancery, where a master of the court had, on a reference to him, rejected a large amount of claims under an assignment, as usurious and void, the question, on exceptions to his report, was fully considered by the chancellor, from whose opinion the following rule may be deduced:[4] that where the assignment specifically directs a usurious claim to be paid, or placed in a preferred class of creditors, it cannot be excluded or rejected by the assignee on the ground of its usurious character, nor can other creditors who come in under the assignment object to its allowance,[5] although the usurious excess must

[1] 3 Wend. 573, 574.

[2] "As trustees," it was said, "they ought not to pay any illegal demands; perhaps they would not be bound to set up this defense, but there can be no doubt they are not bound by their obligation as trustees to pay notes which have no legal efficacy, and are as perfectly justified in availing themselves of such a defense, as if they were individually interested." Savage, C. J., 3 Wend. 584.

[3] 7 Paige, 639.

[4] The chancellor held that even if the general principle, that a court of justice will not lend its aid to enforce a contract which is made contrary to the provisions of a statute, is applicable to usurious discounts by banks in another State, the amount of money actually lent upon these notes, with the legal interest thereon, formed a good consideration for a direction to the trustees in the case before him to pay that money to the bank out of the assigned property, and that those who came in as *cestuis que trust* could not object to the legality of the assignment, and the validity of the trusts therein contained. Pratt v. Adams, 7 Paige, 639.

[5] The chancellor dwelt on the distinction existing in this respect between voluntary assignments and those made under the provisions of a bankrupt or insolvent law. "An assignment made under the provisions of a bankrupt or insolvent law only provides for the payment of such debts as could be recovered against the bankrupt or insolvent himself, either at law or in equity. It therefore follows as a necessary consequence, that every creditor who comes in to prove a debt under such an assignment, must be prepared to show a claim which was valid and recoverable against the person whose property has been thus assigned. But in the case of a voluntary assignment, where the assignor creates his own trust, a creditor who comes in to claim a share of the fund under it must be content to take

always be deducted by the assignee in the payment of it. But that a general provision for the payment of debts, in an assignment for the benefit of creditors, will not include debts founded upon a usurious consideration.[1] The doctrine of this case was fully sustained by the Supreme Court in Green v. Morse,[2] in which it was held that the assignees of a debtor who have accepted the trust created by an assignment for the benefit of creditors, have no right to refuse the payment of a debt specifically directed to be paid in the assignment, on the ground of its being usurious, in the absence of any request or authority to them from the assignor, or from any creditor provided for in the assignment, to refuse such payment, and where the assignees are not themselves creditors of the assignor; that in such a case the assignees are mere naked trustees, bound to execute the trust according to its prescribed conditions, with no power to substitute their own discretion in the place of the will of the assignor. It was further held that, even where assignees are also creditors, if they have accepted the assignment and are acting under it, and as agents and trustees for the creditors are seeking the shares provided for them by it, they have elected to enforce it instead of assailing it by a hostile proceeding, and are therefore estopped from questioning its provisions in favor of others while they are claiming the benefit of them for themselves.[3] The distinction taken in Pratt v. Adams, be-

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such share of it as the assignor intended to give him, and cannot claim that which was intended to be given to the assignees in trust for others. A creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment on the ground that they are illegal and a fraud upon the honest creditors of the assignor, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself as a preferred creditor or otherwise." Pratt v. Adams, 7 Paige, 639.

[1] Walworth, C., 7 Paige, 639, 641, 642.

[2] 4 Barb. S. C. 332. It is not a fraud upon other creditors for a debtor to pay or provide for the payment of a usurious debt by an assignment. Murray v. Judson, 9 N. Y. 73; and see 49 N. Y. 643, where Green v. Morse, *supra*, is relied upon; see also Sands v. Church, 6 N. Y. 347; DeWolf v. Johnson, 10 Wheat. 392.

[3] 4 Barb. S. C. 332. In the case of Union Bank v. Bell (14 Ohio St. 200), it was held that the assignee of *land* mortgaged, as distinguished from the assignee of the mere equity of redemption *eo nomine*, may set up the defense of usury (citing Beach v. Fulton Bank, 3 Wend. 573; Pearsall v. Kingsland, 3 Edw. Ch.

tween a case where the assignor directs a specific debt to be paid, and where he assigns generally for the benefit of creditors, was also fully recognized. In the latter case, it was said, the assignees are not bound to pay usurious debts, while in the former they are.[1] In regard to the usurious excess claimed, the court inclined to think that it should be allowed, but, notwithstanding their doubts, concluded to follow the decision of the chancellor in Pratt v. Adams, and accordingly ordered it to be stricken out of the decree.[2]

§ 429. *Distribution in Particular Cases.*—In some States, the processes of ascertaining the debts against the estate, settling disputed claims, and declaring and paying dividends, are regulated, with more or less minuteness, by statute.

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195); and not only may the trustee set up this defense, but the creditor's beneficiaries under the deed will be permitted to contest the validity of the mortgage.

[1] Pratt v. Adams, 7 Paige, 615.

[2] The question how far a creditor who comes in under an assignment is barred from impeaching the claims of other creditors provided for in the same instrument, is one which on the authorities is not free from doubt. In a recent case in the Supreme Court of Arkansas, Mr. Chief Justice English delivered an elaborate opinion, in which he examined a large number of authorities. In the case before him, where the executrix of a deceased assignee, who was also creditor, sought to impeach the claims of certain of the other creditors named in the deed, as being without consideration and inserted in fraud of the creditors, a conclusion adverse to the executrix was reached. This rule rests upon the doctrine of election, under which a party is compelled to accept or reject an instrument from which he draws a benefit, but cannot affirm it in part and disaffirm it in part. The authorities in support of this position are numerous and weighty. See Streatfield v. Streatfield, 1 Lead. Cas. in Eq. (H. & W. notes), 273 (where the English and American cases are collected and reviewed); Adlum v. Yard, 1 Rawle, 163; Gutzweiler v. Lackman, 33 Mo. 168; Pratt v. Adams, 1 Paige, 615; Burrows v. Alter, 7 Mo. 424; Jewett v. Woodward, 1 Edw. Ch. 195; Lanahan v. Latrobe, 7 Md. 268; Miller v. Crawford, 32 Gratt. 277; Lerry v. Bibeau, 2 Minn. 298; Scott v. Edes, 8 Minn. 387; Geisse v. Beall, 3 Wis. 391; Moule v. Buchanan, 11 G. & J. 314; Swanson v. Tarkington, 7 Heisk. (Tenn.) 612; Irwin v. Tabb, 17 S. & R. 422; Green v. Morse, 4 Barb. 332; Maynard v. Maynard, 4 Edw. Ch. 711; Busby v. Finn, 1 Ohio St. 409. On the other hand it has been said that the assignee is not to be supposed to accept the trust except for real and *bona fide* creditors, and that no particular creditor is precluded by taking under an assignment from impeaching any of the debts attempted to be secured by it. Mackintosh v. Corner, 33 Md. 598; Starr v. Dugan, 22 Md. 58; Sixth Ward Bank v. Wilson, 41 Md. 506; and see Pinneo v. Hart, 30 Mo. 561; and see *ante*, p. 158, notes. In Pennsylvania, it seems that the distributees may attack the claim of a creditor by showing fraud or collusion. Pitts v. Steubenville R. R. Co. 3 Grant (Penn.), 68.

A judgment creditor who files his claim to obtain his proportion in a just distribution is not thereby bound to assent to an unjust charge imposed by the trust deed to which he is not a party. Reiff v. Eshleman, 55 Md. 582.

In Connecticut, the power of receiving and passing upon the claims of creditors is vested in *commissioners* appointed by the Court of Probate (after notice given by the trustees), who, after being sworn, give public notice of the times and places of their meeting.[1] The court limit a time (not less than three months nor more than six months), for creditors to exhibit their claims; and the commissioners are required to act upon the claims exhibited to them, and allow such of them, exhibited within the said time, as shall be proved to be justly and lawfully due.[2] Any claim against an insolvent estate, whether founded in contract or tort, may be proved before the commissioners and allowed by them.[3] The commissioners, as soon after the expiration of the time limited as it can reasonably be done, are required to make their report to the court, containing a list of all the claims exhibited to them, and specifying those which they have allowed and those which they have disallowed.[4] The court then direct the payment of the debts against the estate to be made in the following order, to wit: first, the expenses of executing the trust and settling the estate; secondly, all lawful taxes and all debts due to the State; and lastly, the debts of the several creditors as allowed, in proportion to their respective amounts.[5]

A creditor who does not exhibit his claim is bound, unless he can show some estate not in the inventory.[6]

In Maine, under the statute regulating assignments, creditors becoming parties to the assignment, and presenting their claims to the assignee for allowance, are required to offer the same proof thereof, and if dissatisfied with his decision, have the same right of appeal and the same remedy that is provided in relation to claims presented to commissioners on insolvent estates, and also have the same remedy

[1] Gen. Stat. (Rev. 1875), p. 388, § 7.
[2] Id. § 8.
[3] Id. § 9.
[4] Id. § 11.
[5] Id. p. 386, § 34.
[6] Id. p. 389, § 9.

on the assignee's bond that is provided in relation to an administrator's bond.[1]

§ 430. In New Jersey, under the statute regulating assignments, before the assignee can proceed to make a dividend, he must, at the expiration of three months from the date of the assignment, file with the surrogate of the county wherein the debtor resided at the time of making the assignment, a true *list*, under oath or affirmation, of all such creditors of the debtor as shall claim to be such, with a true statement of their respective claims, having first *advertised*, as prescribed by the statute, for six weeks next preceding the end of said term, making known thereby that all claims against the debtor's estate, must be made as prescribed by the statute, or be forever barred from coming in for a dividend otherwise than as provided.[2] The statute then declares that it shall be lawful for the assignee, or any creditor or other person interested, to appear at the next term of the orphan's court, and file *exceptions* to the claim or demand of any creditor exhibited as aforesaid; and said court shall cause a notice to be served on said creditor, in such mode as the court may direct; and shall then proceed to hear the proofs and allegations in the premises, allowing the parties a right to have the controversy settled by jury.[3]

The assignee will be bound by a creditor's claim if he does not make his exceptions to it within the time and in the manner above prescribed; informal objections made out of court are not sufficient.[4]

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[1] Rev. Stat. (ed. 1871), p. 544, c. 70, § 6; see *ante*, p. 32.

[2] Rev. Stat. (ed. 1878), p. 37, § 5. In the case of Van Keuren v. McLaughlin (21 N. J. Eq. 163), where a creditor who had not proved his claim or shared in the final distribution of the estate, discovered that a certain conveyance by the debtor, though absolute upon its face, was in fact a mortgage, and the equity of redemption of the mortgaged premises passed to the assignee, it was held that the creditor making the discovery was entitled to be paid out of the proceeds of the discovered property an amount equal to the ratable share of the other creditors; and after payment of this amount the balance should be distributed ratably among all the creditors.

[3] Rev. Stat. (ed. 1878), p. 38, §§ 6, 7. [4] Miller v. Mulford, 31 N. J. Eq. 66.

At the first term of the court succeeding the expiration of the three months limited by the statute, and of the time of giving notice, should there be no exceptions made to the claim of any creditor, or if exceptions have been made and adjudicated or settled by the court, the assignee is required to proceed to make, from time to time, fair and equal dividends among the creditors, of the assets which shall have come to hand, in proportion to their claims.[1] It is further provided that any creditor may not only exhibit any debt due, but those to grow due, making, in such case a reasonable rebate, when interest is not accruing on the same.[2]

§ 431. In Missouri, the assignee is required by statute to appoint a day, within three months after the date of the assignment, and a place, which shall be the county seat of the county where the inventory is filed, or some other place in said county most convenient to all the parties at interest, where any court of record may be lawfully held, when and where he will proceed publicly to adjust and allow demands against the estate and effects of the assignor.[3] He is required to give notice of such time and place, by advertisement published in some newspaper printed in the county, or if there be none, in the one nearest the place where the inventory is filed, for four weeks, the last insertion to be at least one week before the appointed day; and also, whenever the residence of any of the creditors is known to him, by letter addressed to such creditors, at their known or usual place of abode, at least four weeks before the appointed day.

The assignee must attend at the place designated in said notice, in person, on said day, and must remain in attendance at said place on said day, and during two consecutive days thereafter, and shall commence the adjustment and allowance of demands against the trust fund at nine o'clock A. M., and continue the same until five o'clock P. M., of each of said three days; and all creditors who, after being notified as

[1] Rev. Stat. (ed 1878), p. 38, § 8.
[2] Id. p. 41, § 22.
[3] R. S. (1879), § 372.

aforesaid, shall not attend at the place designated during the said term, and lay before the assignee the nature and amount of their demands, shall be precluded from any benefit of said estate, but the hearing on any demand presented at the time may be continued, for good cause shown, to such time as is deemed right; provided that any creditor who shall fail to lay his claim before said assignee during said term, on account of sickness, absence from the State, or any other good cause, may at any time before the declaration of the final dividend, file and prove up his claim, and the same may be allowed, and the remaining dividends paid thereon, as in the case of other allowed claims.[1]

The assignee has power to administer all necessary oaths to debtors, creditors and witnesses; and may examine them on oath touching any claim exhibited to him for allowance.[2] He must require such evidence, and no other, of the justice of such demands as is required to establish demands of a similar character in the circuit court in suits between the original parties to the contract.[3] His decision is final unless a creditor or other person interested asks for an appeal. All appeals so asked shall be allowed to the circuit court having jurisdiction.[4]

The statute further regulates the procedure on such appeal and provides for allowing demands of the assignee against the assignor.

As soon as practicable, and not exceeding one month after the time for an allowance of demands under the act, the assignee is required to pay upon the demands allowed, according to their right, as much as the means in hand will permit, after reserving enough for proper fees, costs, expenses, and demands, whose trial is legally continued or removed, and as often thereafter as a dividend of five per cent. can be paid upon the demands allowed as aforesaid, the assignee is required to give notice of such payment, by publication thereof for one week, in the same newspaper in which was published the no-

[1] R. S. (1879), § 373.
[2] Id. § 374.
[3] Id. § 375.
[4] Id. § 376.

tice of allowance of demands, or in such other newspaper as the court or judge thereof in vacation may direct; and if the assignee neglect or refuse to make payment out of such trust fund as required, for more than three days after the same have become due, and have been demanded by the person entitled thereto, his agent or attorney; or if he shall, in any wise, neglect or refuse to comply with the provisions of the section, he shall, for every such neglect or refusal, forfeit and pay to the person aggrieved five per cent. per month interest on such sum as such person was entitled to at the time of such demand, to be recovered by motion in the court having jurisdiction of said assignment; and any judgment of said court, on the hearing of such motion, shall be against said assignee and his securities; and such assignee shall, in addition to such forfeiture, be subject to be dismissed from his trust by said court for such neglect and refusal, on motion and citation for that purpose.[1]

§ 432. In Indiana, the assignee, within six months after entering upon the duties of his trust, is required to report to the judge of the court of common pleas, under oath, the amount of money in his hands from sales and collections, and the amount uncollected, together with a list of the claims which have been presented to him, noting those which he allows and those which are disallowed.[2] Claims which are disallowed are to be tried at the succeeding term of the court.[3]

So in Iowa, at the expiration of three months from the time of first publishing the notice, the assignee is required to report and file with the clerk of the court, a true and full list under oath, of all creditors who have claimed to be such, with a statement of their claims, and also an affidavit of publication and list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing duly verified.[4] Objections to the claims may be filed, and the court, at the next term, hears and determines upon them.[5]

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[1] R. S. (1879), § 387. See January v. Powell, 29 Mo. 241.
[2] 1 Stat. of Ind. (Davis), 1876, p. 146, § 11.
[3] Id. § 12.
[4] Iowa Code (1880), § 2120.
[5] Id. § 2121.

Creditors who shall not exhibit their claims within the term of three months from the publication of notice, shall not participate in the dividends until after the payment in full of all claims presented within said term, and allowed by the court.[1] Similar provisions exist in Wisconsin[2] and Michigan.[3]

In New Hampshire, every creditor is required to file in the probate office, within six months after the assignment, a distinct statement of the particulars of his claim against the debtor, and of the offsets thereto, verified by the oath or affirmation of himself, his agent or attorney.[4] The form of the verification is given in the statute.[5]

The Illinois statute[6] requires the assignee to notify creditors to present their claims within three months after notice. He must report and file with the clerk a list of those claiming to be creditors, with a statement of their claims. Within thirty days after the filing of the report, notice of exception to any demand may be filed with the clerk, and a jury trial may be had.

After the expiration of the three months, if no claims are excepted to, the court must order the assignee from time to time to make fair and equal dividends of the assets in his hands, in proportion to the claims. Any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement must be made, when the same are not drawing interest. There is a similar statute in Oregon.[7]

Provision is made in Texas for the presentation and allowance of claims, and in a proper case the assignee may be restrained by injunction from paying a claim.[8] Claims that are not due may be allowed at their present value by discounting them at the rate of interest mentioned in the contract, if any, otherwise at the legal rate.[9]

Objections to the claims so presented may be filed within

[1] Iowa Code (1880), § 2126.

[2] R. S. of Wis. (1878), § 1698, *et seq.*

[3] Laws of 1881, No. 278.

[4] Gen. Stat. (ed. 1878), p. 337, § 11.

[5] Ibid.

[6] R. S. (1881, Cothran), pp. 118, 119, 120, §§ 2, 4, 5, 10; see part of the statute given in § 455, *post.*

[7] Laws 1878, pp. 36, *et seq.*

[8] Act of 1879, c. 53, §§ 7, 12; appendix to R. S. (1879), pp. 6, 7, §§ 7, 12.

[9] Id. § 18.

seven months after the assignment, specifying the particular items objected to, under the oath of the debtor, assignee, or creditor objecting. The judge of probate, on notice to the parties, allows or disallows the claims.[1] Appeals may be taken from the judge of probate to the supreme court.[2]

In Massachusetts, under the statute of 1836, c. 238, § 6, the assignees were directed to declare and pay dividends from time to time, as soon as might be after converting the effects into money; provided, that where it should appear that there were creditors, who from their distant residence or other sufficient reason, could not become parties to the assignment before the making of the first dividend, or where it should appear that there were any of the classes of creditors named in the second section of the statute, whose debts should not have, but might afterwards, become absolute, the assignees might retain from the funds a sum sufficient to pay to every such supposed creditor, an equal proportion with the other creditors.

In South Carolina, under the act of 1828,[3] the creditors may appoint as many agents as the debtor appoints assignees, to act jointly with them, and any sales or transfers by the assignees, before the appointment of such agents, are void, unless the creditors neglect to appoint them for ten days after the assignee has called them together for that purpose. In case of disagreement between the assignees and agents, any of the judges of the common pleas may appoint an umpire to act jointly with them.

The agents are trustees of the creditors, but the assignees, having no relation of confidence towards the creditors, may buy their claims, and by so doing acquire the rights of creditors, as against the agents.[4]

It may be laid down as a reasonable rule, followed in many of the States, that whatever a creditor may lose by not presenting his claim for allowance within the statutory period,

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[1] Gen. Stat. (ed. 1878), p. 337, § 13.
[2] R. S. (1873), p. 447.
[3] Id. §§ 23, 24, 25, 26.
[4] McIntyre v. McClenaghan, 12 S. Ca. 185.

by reason of a partial settlement of the trust, yet he may come in at any time for at least his equitable share in the assets unadministered and not properly disposed of at the time he presents or prosecutes his claim for allowance in the mode prescribed by the statute.[1]

§ 433. *Notice of Dividend.*—Independently of any statutory provision, the assignee should always give notice to the creditors of the payment of any dividends under the assignment, otherwise he will become liable to the payment of interest. In some cases this is provided for by the assignment itself. In an important case in Louisiana, where the assignment directed thirty days' notice to be given of the assignee's intention to make a dividend, and also required creditors to prove their debts, in order to entitle them to a dividend, it was in both respects approved by the court.[2]

§ 434. *Order of Payment.*—In distributing the proceeds of the assigned property, a certain order is to be observed by the assignee, even where the general creditors are to be paid ratably. Priorities in payment have been given by law to the following descriptions of creditors: first, the United States; secondly, the State; thirdly, claims for taxes; fourthly, rent due.

§ 435. *Priority of the United States.*—The United States have the exclusive privilege of being entitled to priority of payment over other creditors, in all cases of the insolvency or bankruptcy of their debtor.[3] This priority was

[1] Owens v. Ramsdell, 33 Ohio St. 439; but see Matter of Holt, 45 Iowa, 301; see Pfeifer v. Dargan, 14 S. Ca. 44.

[2] United States v. Bank of the United States, 8 Rob. (La.) 262; Garland, J., Id. 412.

In New York, prior to the General Assignment Act of 1877, it was a rule in equity that creditors who failed to come in and prove their claims, after due advertisement and notice, were thereby barred (Kerr v. Blodgett, 48 N. Y. 62); but under that act, all the creditors whose names appear in the schedules of the assignor with the proper statement of their claims, and whose claims are not contested, are entitled to their dividends, even though their claims are not presented to the assignee after the advertisement (Matter of Currier, 8 Daly, 119); but see Matter of Bailey, 58 How. Pr. 446, which insists upon the necessity of proof by the creditor.

[3] United States v. Fisher, 2 Cranch, 358. A sketch of the origin of this claim of priority, and of the various enactments on the subject in the United States, may be found in the opinion of Mr. Justice Story, in the case of the United States v. The State Bank of North Carolina, 6 Pet. 35, 36.

given by the acts of March 3, 1797, and March 2, 1799. By the former it was declared (§ 5) that "where any person becoming indebted to the United States, by bond or otherwise, shall become insolvent, the debt due to the United States shall be first satisfied,;" and the priority given by the act was expressly extended to include cases "in which a debtor, not having sufficient property to pay all his debts, shall make a *voluntary assignment* thereof."[1] By the act of 1799, it was declared that in all cases of insolvency, or where any estate in the hands of executors, administrators, or *assignees*, shall be insufficient to pay all the debts, the debt or debts due the United States, on any bond or bonds for the payment of duties, shall be first satisfied; and any executor, administrator or assignee, who shall pay any debt due by the person or estate for whom or for which they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied, shall become answerable in their own person and estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid, and actions may be commenced against them for the recovery of such debts. The cases of insolvency, mentioned in the act, are expressly declared to embrace (as in the preceding act) cases where a debtor, not having sufficient property to pay all his debts, shall have made a *voluntary assignment* for the benefit of his creditors.[2]

§ 436. Under these acts, it has been held that insolvency or inability to pay his debts, by any one who is a debtor to the United States, does not give the United States the preference, unless the same be accompanied by a voluntary assignment of all the property of the debtor, for the benefit of his creditors. *Aliter*, if there be a legal insolvency.[3] It has been further held that the priority of the United States

[1] 1 U. S. Stat. at Large, 515; U. S. Rev. Stat. § 3466.

[2] 1 U. S. Stat. at Large, 676; U. S. Rev. Stat. (1878), §§ 3466, 3467.

[3] Thelluson v. Smith, Pet. C. C. 195. As to the meaning of the term "voluntary assignment," see *ante*, § 2, and notes.

extends as well to debts by bonds for duties, which are payable after the insolvency of the obligor, or after the date of an assignment made by him, as to those actually payable or due at the time of such insolvency or assignment.[1]

§ 437. But to entitle the United States to priority of payment out of funds in the hands of assignees, the assignment must have been a *general* one of all the debtor's property,[2] as distinguished from a *partial* one.[3] An assignment of a portion, however large, without fraud, is not sufficient.[4] Insolvency, in the sense of the statute, relates to such a general divestment of property as would in fact be equivalent to insolvency in its technical sense. It supposes that all the debtor's property had passed from him.[5] But if only a trifling portion of the assignor's estate be omitted or reserved, whether by mistake or for the purpose of evading the statute, such omission or reservation will not make the assignment a partial one, so as to defeat the priority.[6] Where there is an omission of an article of property in an assignment which purports to be general, but which does not show that the intention was that the assignment should be a partial as opposed to a general one, it does not take the case out of the act.[7] And if the assignment does not on its face appear to be general, the *onus probandi* is on the United States.[8] Thus, where the deed of assignment conveys only the property mentioned in the schedule annexed,

[1] United States v. The State Bank of North Carolina, 6 Pet. 29.

[2] United States v. Monroe, 5 Mason, 572; United States v. Howland, 4 Wheat. 108; United States v. Mott, 1 Paine, 188; United States v. Clark, Id. 629; United States v. Hunter, 5 Mason, 229; United States v. Hooe, 3 Cranch, 73; Conard v. Atlantic Ins. Co. 1 Pet. 386; Story, J., Id. 439; United States v. McLellan, 3 Sumn. 345; United States v. Bank of the United States, 8 Rob. (La.) 262; see Dias v. Bouchaud, 10 Paige, 445.

[3] See *ante*, p. 201.

[4] United States v. Monroe, 5 Mason, 572.

[5] Conard v. Atlantic Ins. Co. 1 Pet. 386, 439.

[6] United States v. Hooe, 3 Cranch, 73; United States v. Langton, 5 Mason, 280, 289; United States v. McLellan, 3 Sumn. 345.

[7] United States v. Clark, 1 Paine, 629; Mott v. Maris's Assignees, 2 Wash. C. C. 196.

[8] United States v. Clark, 1 Paine, 629; United States v. Langton, 5 Mason, 280, 289; United States v. Howland, 4 Wheat. 108.

and the schedule does not purport to convey *all* the property of the party who made it, the *onus probandi* is thrown on the United States to show that the assignment embraced all the property of the debtor.[1] But a debtor cannot, by assigning all his property by different acts, defeat the priority of the United States, under the pretext of the assignments being partial.[2] It has been further held, recently in New York, that an assignment by a debtor, who is insolvent, of his property in trust for the benefit of a single creditor or surety, containing no provisions for the benefit of creditors generally, is not within the act of March 2, 1799.[3]

§ 438. In regard to the nature of the priority established in favor of the United States, it was held in Conard v. The Atlantic Insurance Company,[4] that it is not a right which supersedes and overrules the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, so as to prevent its passing by virtue of such assignment to the assignees; but it is a mere right of prior payment out of the general fund of the debtor in the hands of the assignees; and the assignees are rendered personally liable if they omit to discharge the debt due to the United States. In Brent v. The Bank of Washington,[5] it was held to have been the uniform construction of the fifth section of the act of 1797, and of the similar provision in the sixty-fifth section of the collection act of 1799, that whether in a case of insolvency, death, or assignment, the property of the debtor passes to the assignee, executor, or administrator, the priority of the United States operates not to prevent the transmission of the property, but gives them a preference in payment out of the proceeds. It was further held that this preference is in the appropriation of the debtor's estate; so that if, before it has attached, the

[1] United States v. Howland, *ubi supra*.
[2] United States v. Bank of the United States, 8 Rob. (La.) 262.
[3] Bouchaud v. Dias, 1 N. Y. 201.
[4] 1 Pet. 386; Story, J., Id. 439.
[5] 10 Pet. 596.

debtor has conveyed or mortgaged his property, or it has been transferred in the ordinary course of business, neither are overreached by the statutes; and it has never been decided that it affects any lien, general or specific, existing when the event took place which gave the United States a claim of priority.[1] In Beaston v. The Farmers' Bank of Delaware,[2] the rule was held to be clearly established, under the act of March 3d, 1797, that whenever a debtor has been divested of his property in any of the modes stated in the act, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay the debt first, out of the proceeds of the debtor's property. The moment the transfer of property takes place, the person taking it, whether by voluntary assignment or by operation of law, becomes, under the statute, bound to the United States for the faithful performance of the trust.

It was further held in this case in regard to the description of debtors contemplated by the act, that all debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used in the fifth section of the act; that it was manifest that Congress intended to give priority of payment to the United States, over all other creditors, in the cases stated therein; and that it therefore lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions. It was accordingly held that corporations were to be deemed and considered *persons* within the provisions of the fifth section of the act, and that the priority of the United States existed as to debts due by them to the United States.

§ 439. The priority of payment thus given, is one which cannot be divested by the act of the debtor. Accordingly, an assignment made by a debtor of the United States, when his property was about being levied upon under judgments

[1] See United States v. Fisher, 2 Cranch, 358; United States v. Hooe, 3 Id. 73.
[2] 12 Pet. 102.

obtained against him by one of his creditors, in trust, first for the debt of such creditor, *and then* for the debt of the United States, was held to be a voluntary assignment, and fraudulent and void against the United States, notwithstanding the creditor gave up his intention of levying in consideration of such assignment, and that the property might be sold under it, to the best advantage, for the benefit of the sureties to the United States.[1]

This right of priority, however, attaches only on the residue of the fund in the assignee's hands after payment of the expenses incurred in its collection.[2] And the same right of priority which belongs to the government, attaches to the claim of an individual who, as surety, has paid money to the government.[3] A surety on a custom house bond, who has paid it, has the same priority as the United States, against the estate of his principal, in the hands of his assignee.[4] But where a debtor made an assignment of his property in trust for the benefit of a *single* creditor, and his surety in certain custom house bonds filed a bill, claiming that the United States had acquired a right to be first paid, and to be subrogated to that right, on the ground that, as such surety, he had been compelled to pay the bonds, it was held that the bill could not be sustained.[5]

§ 440. *Secured Creditors.*—As to the manner in which creditors holding collateral or other securities shall share in the trust estate, it is held in some of the States that the secured creditor having first exhausted his security, can receive a dividend only upon the balance then remaining unpaid; while in other States he is permitted to receive his dividend upon the whole amount of the indebtedness existing at the time of the assignment. In Pennsylvania, the latter rule prevails. Thus, it has been decided that a cred-

[1] United States v. Mott, 1 Paine, 188.
[2] United States v. Hunter, 5 Mason, 229.
[3] Hunter v. The United States, 5 Pet. 173.
[4] United States v. Hunter, 5 Mason, 229.
[5] Bouchaud v. Dias, 1 N. Y. 201.

itor who has a lien upon a particular portion of the assigned estate (as by mortgage upon land for unpaid purchase money), and out of the sale of a part of which he realizes a portion of his claim, is entitled to his *pro rata* dividend on the *whole* claim, out of the general assets in the hands of the assignee, to an amount sufficient to pay the balance of his demand in full, although a portion of the estate upon which he holds the lien remains unsold.[1] It was further held that an assignee in such case, who has paid claims in full, which upon a distribution are only entitled to a *pro rata* payment, cannot claim to be subrogated to the rights of the lien creditor, for the purpose of indemnifying himself for such payments beyond the assets in his hands.[2] "He cannot," said the court (Black, J.), "make reprisals upon one creditor, to indemnify himself for paying too much to another."[3] In another case in the same State, where one of several creditors, for whose benefit a debtor had made an assignment without preference, had a bond for a large amount, secured by a mortgage, and the dividend allowed to creditors from the avails of the personal property was 8.26 per cent., of which the creditor's portion ($1,650) on the whole debt ($20,000) was set apart for future disposition, and he afterwards received $17,938 from his mortgage, it was held that he was entitled to receive the dividend on the whole debt, in addition to what he received on the mortgage.[4]

This doctrine was carried to an extreme length in the later case of Graeff's Appeal, where the assigned real estate was sold subject to three judgments of Graeff; out of the proceeds two of these judgments were paid in full and the third in part. The court below decreed a dividend on the whole of the *unpaid* judgment only out of the personal estate, but on appeal this was held to be an error, and that the dividend should be on the whole amount of all the

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[1] Keim's Appeal, 27 Penn. St. 42.
[2] Id. ibid.
[3] Id. 45.
[4] Morris v. Olwine, 23 Penn. St. 21.

judgments, until they should be paid in full, if a *pro rata* dividend would reach that.[1]

Where a vendor having delivered a portion of the goods sold under a contract with the insolvent assignor, retained and sold the balance, and applied the proceeds in payment of the amount due under the contract, he was held to be entitled to a dividend upon the whole of the contract indebtedness, and not merely upon the unpaid balance.[2]

The general rule is that if a creditor have two funds out of which he may make his debt, he will be required to resort to that fund upon which another creditor has no lien[3]—and although the secured creditor is entitled to enforce the collaterals, and, if they be insufficient, to claim a dividend also under the assignment, until the whole debt is paid, yet, in computing the amount of the dividend, the claim of each creditor must be taken as reduced by the amount which he has received under the collaterals.[4]

In New Hampshire, it is provided that if any creditor holds collateral security for his debt, of less value than such debt, the judge of probate shall estimate the value of such security, and allow only the difference between such sum and his debt.[5] In Texas[6] the assignee has this power.

If the creditor is dissatisfied with the estimate, he may surrender the security to the assignee, who shall apply the

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[1] 79 Penn. St. 146.

[2] Patten's Appeal, 45 Penn. St. 151; see Miller's Appeal, 35 id. 481. A creditor who has bought land from the assignor, subject to incumbrances which he discharges, cannot maintain a claim against the estate on the original indebtedness, either by taking assignments of the incumbrances or otherwise. Cooley's Appeal, 1 Grant (Penn.), 101; Hansell v. Lutz, 20 Penn. St. 284.

[3] Story's Eq. Jur. § 559.

[4] Midgeley v. Slocum, 2 Abb. Pr. N. S. 275; s. c. 32 How. Pr. 423; Wurtz v. Hart, 13 Iowa, 515; Dickson v. Chorm, 6 Iowa, 19. In Bell v. Fleming's Ex'rs (12 N. J. Eq. 490), the question is left in doubt. In Indiana, it is provided that before the holder of any lien or incumbrance shall be entitled to receive any portion of his debt out of the general fund, he shall proceed to enforce the payment of his debt, by sale, or otherwise, of the property on which such lien or incumbrance exists; and for the residue of such claim, such holder of such lien or incumbrance shall share *pro rata* with the other creditors, if entitled so to do by the laws of the State. 1 Stat. of Ind. (Davis, 1876), p. 146, § 13.

[5] Gen. Stat. of N. H. (1878), p. 337, § 15; see also Knowles' Petition, R. I. Index M, 76.

[6] Acts of 1879, c. 53, § 13; Appendix to R. S. (1879), p. 7, § 13.

proceeds to the payment of the creditor's claim, and allow the difference between the sum so paid and the amount of the claim.[1]

§ 441. *Taxes and Debts Due the State.*—Taxes assessed upon the property assigned, and debts due to the State, usually occupy the next place in the order of priority, after payment of debts due to the United States. In Connecticut these are, by statute, directed to be paid next after the expenses of executing the trust and settling the estate.[2] Priority of payment is frequently given to taxes and assessments, by the express terms of the assignment.[3] And a similar priority is given (next after debts due to the United

[1] Gen. Laws of N. H. (1878), p. 337, § 16.

There is a line of cases in Pennsylvania, which hold that instructions to the sheriff to stay proceedings, or not to proceed upon an execution, or which indicate that it was issued, not for the purpose of levy and sale, but for the purpose of lien, and to acquire security for the debt, will destroy the lien as to purchasers and subsequent execution creditors. Commonwealth v. Stremback, 8 Rawle, 341; Corlies v. Stanbridge, 5 Id. 286; Freeburger's Appeal, 40 Penn. St. 244; Pary's Appeal, 41 Id. 278; Stern's Appeal, 64 Id. 447; Keyser's Appeal, 13 Id. 409.

But *bona fide* execution creditors, who have issued execution for the purpose of levy and sale, may consent that the assignee sell the debtor's property, instead of the sheriff, without losing the security of their lien. Kent's Appeal, 87 Id. 165.

Under the Pennsylvania Act of 1876, enabling assignees for the benefit of creditors to sell real estate, the date of the confirmation of the sale is the day when the land is converted into money, and the liens thus discharged must be paid according to their priority, on that day (Tomlinson's Appeal, 90 Penn. St. 224; Burkholder's Appeal, 94 Id. 622), with interest until that day (Carver's Appeal, 89 Id. 27). This rule has an important application in saving judgment liens, where the five years from their entry would expire before payment of the purchase money and delivery of the deed (Herbst's Appeal, 90 Id. 353).

But under the Ohio Assignment Act, the priority of judgment liens is to be determined as the liens exist at the time of the assignment (Scott v. Dunn, 26 Ohio St. 68).

[2] Rev. Stat. (ed. 1875), p. 386, § 34; and in Ohio R. S. (1880), § 6355.

[3] A direction to pay rents and taxes on real estate does not invalidate an assignment. It is a necessary power to preserve the property, and the assignee should have been authorized to do it, if the authority was not included in the instrument. Van Dine v. Willett, 24 How. Pr. 206; see Murray v. De Rottenham, 6 Johns. Ch. 52; Gardner v. Diedrichs, 41 Ill. 58. An assignment is not such a transfer as will divest personal property of a lien of the State for taxes, however it might be in the case of a transfer to an absolute purchaser in good faith for a valuable consideration. Cones v. Wilson, 14 Ind. 465. And in New Jersey it has been held that the assignee must pay taxes under the act of 1866, on the whole estate, though claims to more than double the assets had been presented, and many of the claimants were non-residents. State v. Grover, 37 N. J. L. 175. If the trustee neglect to pay taxes, any beneficiary in the deed can advance the taxes and ask contribution from the other beneficiaries, or claim reimbursement out of the trust fund, but he cannot permit the lands to be sold for taxes and acquire a

States), by the statutes regulating the order of the payment of debts by executors and administrators.[1]

In Minnesota the order of priority is, "first, all debts owing to the United States, and all debts owing to the State of Minnesota."[2] In Missouri[3] a similar provision exists.

§ 442. *Claim of Landlord for Rent.*—In many cases the landlord of the assignor's premises is entitled to a preference over other creditors, arising from his right to distrain the goods assigned. But where that right does not exist, the rent being due and in arrear, or where, if the right to distrain does exist, he omits to exercise it, and suffers a *bona fide* sale and removal by the assignees, he stands in the same position with respect to the proceeds of the sale, as any other creditor.[4] In a case in Pennsylvania, where the landlord of the assignor gave notice to the assignee of the amount of rent due, before the sale or removal of the goods, and told him that he wished to have it secured to him, which the assignee promised to do as far as the law allowed, it was held that the assignee was justified in paying the amount of rent to the landlord.[5]

In New Jersey, it has been expressly provided by the statute of assignments, that in all cases where any debtor, being a tenant, shall make an assignment under that act, all

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valid legal title by purchasing in the certificate of sale. Pettus v. Wallace (39 Ark. 476), as cited in Frierson v. Branch, 80 Ark. 453, 464.

The New York doctrine is that if the assignment in terms gives no preference to the payment of taxes, the assignee has no authority and cannot be compelled to give such a preference, because both he and the control of the court over him are limited by the terms of the assignment. Matter of Lewis, 81 N. Y. 421. This decision does not question any right the State may have to distrain for taxes, but no individual can enforce that right. Id.; see Wright v. Wigton, 84 Penn. St. 163.

[1] See 3 N. Y. Rev. Stat. (7th ed.) p. 2298, § 27.

[2] Minn. Gen. St. (1878), c. 41, § 28. [3] Laws of 1881, p. 85.

[4] Morris v. Parker, 1 Ashm. 187. But probably in those States in which the landlord's common law lien is recognized, such lien and his right to distrain are not affected by the acceptance and recording of the assignment, and the assignee's taking possession under it (Eames v. Mayo, 6 Ill. App. [Brad.] 334; O'Hara v. Jones, 46 Ill. 288), provided the landlord exercises his rights before removal of the property. Hadden v. Knickerbocker, 70 Ill. 677.

[5] Osborne's Estate, 5 Whart. 267; Goodwin v. Sharkey, 80 Penn. St. 149; Keeley v. Cassidy, 93 Id. 318.

the goods and chattels of such tenant, on the premises in the possession of such tenant, shall be first bound for the payment of rent due to his landlord; and the said claim for rent, in favor of the landlord, not exceeding one year's rent, shall be first paid and satisfied by the assignee, out of the goods and chattels of the said tenant, which were on the demised premises at the time of the assignment.[1] It is further provided by the same statute, that if the tenant, his assignee, or any other person, shall remove any goods or chattels from the demised premises, after the assignment, it may be lawful for the landlord, at any time within forty days after the removal, to seize such goods and chattels, in whose hands soever the same may be found, as a distress for his said rent, and proceed with the same in the manner directed by the act concerning distresses, whether the rent, by the terms of the lease, be due or not, making a rebate on the sum not due.[2]

Assignees are bound to pay rent to the landlord for the period during which they occupy the premises for the purpose of discharging the duties of the trust.[3] But to make them responsible for the rent of premises leased to the assignor for a term of years, it must appear that they have expressly or impliedly elected to accept the lease.[4]

§ 443. *Other Priorities.*—In Pennsylvania, it is provided by statute, that in all assignments of property, whether real or personal, which shall hereafter be made by any person or persons, or chartered company, to trustees or assignees, on account of inability at the time of the assignment to pay his or their debts, the wages of miners, mechanics, and laborers, employed by such person or persons, or chartered company, shall be first preferred and paid by such trustees or assignees, before any other creditor or creditors of the assignor,

[1] Rev. Stat. (ed. 1878), p. 39, §§ 10, 11.

[2] Id. p. 12, § 11.

In Texas a landlord has a statutory lien upon the crops which his tenant raises on the rented premises, and it is pretty certain this lien extends also to his other goods and chattels. Rosenburg v. Shaper, 51 Tex. 184.

[3] Morris v. Parker, 1 Ashm. 187; and see Gould v. Keer, 52 Ga. 154.

[4] Pratt v. Levan, 1 Miles, 358.

provided that any one claim thus preferred shall not exceed one hundred dollars.[1] And in New Jersey, it is provided that the wages of clerks, miners, mechanics, and laborers, due at the time of making the assignment from the person or persons making the same, shall be preferred debts, and shall be first paid by the assignee, before any other claim or debt shall be paid, provided that no payment shall be made as a preferred debt to any one person to an amount exceeding three hundred dollars.[2]

In Connecticut, debts due from any insolvent debtor whose estate is in settlement, for any labor performed for him within six months before the assignment, shall be allowed and paid in full, to the amount of fifty dollars, before the general liabilities of such debtor are paid.[3]

In Minnesota, the wages of servants, laborers, mechanics, and clerks, for three months next preceding the assignment, are preferred, and to be paid in full next in order after debts to the United States and to the State.[4]

So in Ohio, operatives are preferred to the extent of three hundred dollars for services performed within twelve months preceding the assignment.[5] In Colorado[6] the statute is similar.

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[1] Act April 22d, 1854, § 1; Laws of 1854, p. 480; Purd. Dig. (Brightley, 10th ed.) p. 91, § 4. By the previous act of April 2d, 1849, a similar priority was allowed to claims of this character; but it was limited to assignments made by persons engaged in certain descriptions of business (coal mines, forges, furnaces, rolling mills, nail factories, machine shops and foundries), and it was further limited to certain counties (Schuylkill, Berks, Washington, Centre, Somerset, Westmoreland and Carbon). The claims of each miner, &c., thus preferred, were also limited to fifty dollars. Purd. Dig. p. 835, tit. Wages, pl. 1, 2, 3. By the act of April 14th, 1851, § 10, this limit was extended to one hundred dollars, as far as referred to the county of Schuylkill. Purd. Dig. *ubi supra*, pl. 4; see Re Sackett, 1 Luz. Leg. Reg. 243.

[2] Rev. Stat. (ed. 1878), p. 38, § 8.

[3] Gen. Stat. (Rev. 1875), p. 382, § 17. [4] Minn. Gen. Stat. (1878), c. 41, § 28.

[5] R. S. (1880), § 6355.

The creditors of a firm have priority over the creditors of one of its partners, which cannot be affected by all the partners except on retiring and releasing their interest, and an assignment being made by the continuing partner. Phelps v. McNeely, 66 Mo. 554; and see Tenney v. Johnson, 43 N. H. 144; Thomas v. Penrich, 28 Ohio St. 55.

It seems that a partner who is a creditor of his firm, cannot rank as a creditor against it, in competition with outside creditors. Stratton v. Tabb, 8 Ill. App. (Brad.) 225; see Hoyt v. Sprague, 103 U. S. 613.

[6] Laws of 1881, p. 35.

§ 444. *Course of Distribution among Creditors.*—After the payment of any claims which may exist on the part of the United States against the assignor, and such other claims as may be entitled to a priority by any law of the State, the assignee should proceed to distribute the residue of moneys in his hands among the creditors, either ratably and without distinction, or according to the order of priority and preference established by the assignment, unless the latter mode of distribution shall have been overruled or prohibited by statute.[1]

As a general principle of equity, where the deed creates no preferences among creditors, a court of chancery will make a *pro rata* distribution of the proceeds among all the creditors who are provided for in the instrument.[2] There are cases, however, in which certain creditors may be postponed to others, independently of any direction in the assignment. Thus, it has been held that a judgment given by one of two joint assignors for the benefit of creditors to the other, before the assignment, must be postponed to the debts provided for by the assignment, though the judgment has been transferred to one who, with notice of the assignment, paid value for it.[3]

§ 445. *Computation of Dividends.*—The rule in respect to the calculation of dividends, where the estates of two or more persons assigned for the benefit of creditors are liable

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[1] See *ante*, § 105. Where three debtors conveyed lands to the same trustees to be sold, and the proceeds appropriated to the debts of the grantors according to legal priorities, and at the time of the conveyance judgments existed to a large amount against them, both jointly and severally, it was held that the proceeds of this fund should be appropriated according to the several sources whence it was derived, and to the priorities of the several liens. Dodge v. Doub, 8 Gill, 16.

[2] Branch Bank v. Robertson, 19 Ala. 798. And such a distribution cannot be collaterally attacked. Perry v. Murray, 55 Iowa, 416.

[3] Mifflin v. Rasey, 8 Rawle, 488. As to the payment of preferred creditors having other security, see Besley v. Lawrence, 11 Paige, 581; Strong v. Skinner, 4 Barb. S. C. 546, 559. As to the payment of debts due the assignee himself, see Gibbs v. Cunningham, 4 Md. Ch. Dec. 322; French v. Townes, 10 Gratt. 518. As to the payment of partnership debts, see *ante*, pp. 295, *et seq.*

Preferred creditors of the same class must also be paid *pro rata* if there is not enough to pay them in full. Miller v. Crawford, 32 Gratt. 277.

for the payment of the same note or bill, is to take the amount actually due upon the note or bill, at the times respectively at which the first dividend was *declared* of each fund so assigned.[1] In other words, where several persons liable for the payment of a debt have made several assignments for the payment of their creditors, the amount actually due on the debt, at the times respectively when dividends are declared, is to be taken as the sum on which the percentage is to be estimated.[2]

§ 446. *The Payment of a Dividend does not take the Debt out of the Statute of Limitations.*—The payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will take the residue of the debt out of the statutory limitation as against such debtor.[3] Such a payment is not a personal or voluntary act of the assignor. The assignee is not the agent of the debtor; he can neither compel him to admit or reject a claim presented to him for allowance.[4] Chancellor Kent presents the reason of this rule in the following words:[5] "It is going unreasonably far to construe payments by assignees or trustees, who are not

[1] Bank of Pennsylvania v. McCalmont, 4 Rawle, 307.

[2] Perit v. Pittfield, 5 Rawle, 166; and see McLeod v. Latimer, 1 Whart. (Penn.) 532; Bank of Pennsylvania v. McCalmont, 4 Rawle, 307. This was formerly the rule in Pennsylvania, but it has been changed by later decisions, and the present rule is that in such a case as that supposed in the text, the subsequent dividends are to be calculated upon the whole amount of the original debt. Miller's Estate, 82 Penn. St. 113. Whatever may be thought of the wisdom of this change, it must be admitted that the present rule is quite in unison with the other Pennsylvania rule which gives to a secured creditor a dividend upon the original amount of his debt, without deduction of the value of the security. See also Brough's Estate, 71 Id. 460; Hess's Estate, 69 Id. 272; Brown v. Merchants' Bank, 79 N. Ca. 244; Citizens' Bank v. Patterson, 78 Ky. (Rodman), 291.

The old Pennsylvania rule still prevails in many of the States, and accords with the established rule in equity, that when one creditor has a lien upon two funds, and another a lien upon only one of them, the former will be compelled to exhaust the fund upon which he has an exclusive lien, and will be permitted to resort to the other for the deficiency only. Petition of Knowles, R. I. Index M, 76; Besley v. Lawrence, 11 Paige, 581; Wurtz v. Hart, 13 Iowa, 515; Amory v. Francis, 16 Mass. 308; Lanckton v. Wolcott, 6 Met. 305; see Cabot Bank v. Bodman, 11 Gray, 134.

[3] Pickett v. Leonard, 34 N. Y. 175; Pickett v. King, 34 Barb. 193; Marenthal v. Moster, 16 Ohio St. 566; Stoddard v. Doane, 7 Gray, 387.

[4] Day, J., in Marenthal v. Moster, 16 Ohio St. 536.

[5] Roosevelt v. Mark, 6 Johns. Ch. 266, 292.

parties to the contract, or under any personal obligation to pay or contribute, as meaning more than they plainly import, or as carrying with them sufficient evidence of a renewed personal promise of the original debtor to pay. Such special trusts were not created for any such purpose, and it is perverting the intention of the parties, and it is plainly repugnant to the reason and equity of the trust to make the ordinary execution of the trust the ground of a constructive new assumption of the debt by the debtor. The language of the transaction would seem to be directly otherwise."

§ 447. *Interest.*—Where the assignment directs that certain creditors shall be paid "the amount of their respective demands in full," the creditors are entitled to interest on their debts if the fund prove sufficient.[1] And assignees for the benefit of scheduled creditors have been ordered by the court to allow interest on the debts from the time they became due.[2] But it has been held that a debtor may stipulate in the assignment that no interest shall be paid out of the effects conveyed until the principal of all the debts is paid.[3]

The subject of dividends will be further considered in a subsequent chapter.[4]

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[1] Scott v. Morris, 9 S. & R. 128.
[2] Bryant v. Russell, 23 Pick. 508.
[3] Ingraham v. Grigg, 13 Sm. & M. 22.
[4] See *post*, Chap. XXXIX.

CHAPTER XXXVIII.

DISPOSITION OF THE SURPLUS REMAINING AFTER DISTRIBUTION.

§ 448. If, after payment of all the assignor's debts which are legally payable under the assignment, and all liens on the trust effects, there is a surplus of the proceeds of sales and collections remaining in the hands of the assignee, such surplus belongs to the assignor, and the assignee is bound to pay it over to him.[1] In most assignments there is a clause expressly directing him to do so; but whether there be or not, there necessarily arises in such cases a resulting trust, by mere operation of law, in favor of the debtor, which will entitle him to claim it of the assignee.[2] The surplus in no case belongs to creditors whose demands have been paid. Therefore, where an assignee agreed to collect the assets and pay them over to the creditors, it was held that he was not also to pay to them any surplus after discharging their debts in full.[3]

So if, after payment of all the debts, there should remain in the hands of the assignee any property unconverted into money, it belongs to the assignor, and the assignee should reconvey it to him.[4] But if the assignee reconvey the property to the assignor before the debts for the payment of which the estate was created have been paid, the reconveyance is void as to all creditors whose debts were provided

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[1] Marshall, C. J., in Brashear v. West, 7 Pet. 608.

[2] Halsey v. Whitney, 4 Mason, 206, 222, 223; Matter of Potter, 54 Penn. St. 465; Merrick's Estate, 1 Phil. (Penn.), 373; Thompson v. Childress, 1 Tenn. Ch. (Cooper), 369.

[3] Lazarus v. Commonwealth Ins. Co. 19 Pick. 81.

[4] In Harvey v. Steptoe's Adm'r, 17 Gratt. 289, it is said that where a grantor in a deed of trust to secure debts, which conveys real and personal estate, dies intestate before a sale of the trust subject, the *quasi* equity of redemption descends to his heirs, and the surplus proceeds of the real estate, after the trust is satisfied, is applicable ratably to the debts of the grantor by specialty binding the heirs. If he by will directs the sale of his real estate for payment of debts, such surplus proceeds are equitable assets to be distributed among all the creditors.

for by the assignment, and which remained unpaid at the date of the reconveyance.[1]

Where the assignment imposes certain *terms* upon creditors, as the condition upon which they are to receive its benefits, and all the creditors do not choose to accede to such terms, and do not comply with them, it has been held that if a surplus remain after satisfying the claims of the acceding creditors, it belongs to the assignor, and may be legally reserved to him by the assignment itself.[2] This was so held where the condition imposed was the execution of a release without receiving the full amount of the debts.[3] But the better opinion now is,[4] that the surplus in such a case belongs to those creditors who have not acceded to the terms of the assignment; and in Brashear v. West,[5] it was said that a court of equity will award it to them. And even where the terms imposed were that the creditors should agree to a ratable division, and certain creditors refused to accede to such terms, it has been held that if there should be any surplus after the payment of the claims of those who assent, and all other liens upon the trust effects, they, as general creditors, would have a right to subject the surplus to the payment of their demands.[6]

§ 449. The same principle has been applied to cases where certain creditors have lost the benefit of an assignment by failing to comply with some statutory requisition,

[1] Briggs v. Palmer, 20 Barb. 392; Briggs v. Davies, 21 N. Y. 574; s. c. 20 N. Y. 15; see *ante*, p. 13. In Mowry's Appeal (94 Penn. St. 376), several years after a conveyance of real estate to the grantee he made an assignment under which the land was sold, and a surplus remained, which was claimed by the grantee and creditors of the grantor. The conveyance had been made to defraud creditors. The grantor and grantee had represented to the claiming creditors that the grantor still retained his interest in the property, on the strength of which representation the claiming creditors had loaned money to the grantor. The creditors were held entitled to the surplus and the grantee estopped from claiming it.

[2] Halsey v. Whitney, 4 Mason, 206, 222.

[3] Id. ibid.

[4] The validity of stipulations for a release of the assignor have already been considered. See *ante*, pp. 251, *et seq.*

[5] 7 Pet. 608. See Pfeifer v. Dargan, 14 S. Ca. 44.

[6] Vernon v. Morton, 8 Dana, 247, 254, Ewing, J.

as to exhibit their claims within a specified period. Thus, in New Jersey, if any creditor shall not exhibit his claims within the term of three months limited by the statute, such claim will be barred of a dividend, *unless* the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, in which case such barred creditor will be entitled to a ratable proportion therefrom.[1]

In Maine, where distribution is required to be made among all the creditors becoming parties to the assignment, it is provided by statute that, after the lapse of eighteen months from the assignment, or two years, to which the court may for satisfactory reasons extend the time, any creditor not a party to the assignment may trustee the assignee for any excess of the estate, after payment of the debts of the parties thereto and lawful expenses; and if such suit is instituted before the expiration of said terms, it may be continued till after their expiration, on such conditions as the court directs.[2]

And in Massachusetts, where some of the creditors assented to the assignment by presenting their claims, which exhausted the assets collected, and other creditors attached by trustee process a sum due the debtor, which was claimed by the assignee, it was held, in the absence of proof that the sum held by the trustee was necessary to pay the creditors who had elected to come in under the assignment, that the sum in the hands of the trustee was liable to be taken by trustee process.[3]

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[1] Rev. Stat. (ed. 1878), p. 40, § 20. And where a creditor who had not proved his claim, or shared in the final distribution of the estate, discovered certain property of the debtor which had been conveyed in fraud of the creditors, it was held that he was entitled to be paid out of the proceeds of the discovered property an amount equal to the ratable share of the other creditors, and after payment of this amount the balance should be distributed ratably among all the creditors. Van Keuren v. McLaughlin, 21 N. J. Eq. 163.

[2] Rev. Stat. (ed. 1871), p. 545, § 7; see *ante*, p. 32.

[3] Douglas v. Simpson, 121 Mass. 281; see Lahm v. Johnston, 32 Ohio St. 590; Smith v. Millett, 11 R. I. 528.

CHAPTER XXXIX.

FINAL ACCOUNTING AND CLOSE OF THE TRUST BY THE ASSIGNEE.

§ 450. An essential part of the duty of an assignee in trust for the benefit of creditors is the keeping of a strict and full *account* of all his receipts and payments during the course of the execution of the trust; and after all the moneys in his hands arising from collections and sales, have been finally appropriated and paid over to those entitled to them, he should always be prepared to exhibit his accounts to the assignor and the creditors.

If an assignee neglects to keep a full and fair account of the sales of the trust property, and the amount of sales cannot be ascertained by him, he will be charged with the value of the property sold by him, and the interest on it.[1] And as it is ordinarily the duty of the assignee to convert the property into money, and distribute it to the creditors, he will be charged not only with the value of property which he actually does sell, but also with the value of property which he ought to have sold, and which he has lost through an unauthorized use of it.[2] So, if he neglects to keep proper accounts of his expenditures, the lowest estimate will be put on them, in remunerating him therefor.[3] Every intendment of fact, indeed, is to be made against a trustee who keeps none, or very imperfect accounts.[4]

§ 451. *Accounting Without Action.*—In some States, the assignee is expressly required by statute (without any

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[1] Page v. Olcott, 28 Vt. 465.

[2] Matter of Dean, 86 N. Y. 398.

[3] McDowell v. Caldwell, 2 McCord's Ch. 43.

[4] Ex parte Cassel, 3 Watts, 442; and see Green v. Winter, 1 Johns. Ch. 27; Miller v. Whittier, 36 Me. 577; McLain v. Simington, 87 Ohio St. 660.

In South Carolina the creditors' agent appointed under the statute is required to account as well as the assignee. McIntyre v. McClenaghan, 12 S. Ca. 185.

application for that purpose) to present his account to some court designated, for examination and approval, before he can finally discharge himself from the trust. Thus, in New Jersey, the assignee is required, as soon as may be after completing the payment of dividends, and not exceeding one year thereafter, to render, on oath or affirmation, a *final account* to the orphan's court of the county, in like manner, and upon the same notice to creditors and others interested, as directed in regard to executors and administrators; and exceptions may in like manner be filed to such accounts, and proceeded in as prescribed in regard to executors and administrators; and the settlement and decree of the said court are declared to be conclusive on all parties, except for assets which may afterwards come to hand, or for frauds, or apparent error.[1]

In Vermont, it is made the duty of the assignee, on the completion of the discharge of his trust, to file, in the office of the clerk of the county where the assignment is made, and the property assigned is situated, a full copy of the settlement of his trust account, showing in detail how he has administered the trust, which account shall be verified by the oath of the assignee, and shall remain on file in the clerk's office for the inspection of all the creditors of the assignor.[2]

In Maine, the assignee is bound by his official bond, to render a true account of his doings, on oath, to the judge of probate, within six months, and at any other time when cited by the judge.[3]

In Maryland, the assignee is required within six months from the period of giving the bond, to file a report of the whole amount of the trust estate and the disposition made

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[1] Rev. Stat. (ed. 1878), p. 38, § 8.

[2] Act of Nov. 19, 1852, § 5; Laws of 1852, p. 15; Rev. L. (1880), § 1891.

[3] Rev. Stat. (ed. 1871), p. 544, c. 70, § 3; see *ante*, p. 32.
The statute does not require the account to be also *allowed* within six months. Thomas v. Clark, 65 Me. 296.

of the same.[1] If he fail to report, he may be compelled to appear and make report by summons and attachment.[2]

In Wisconsin, the assignee must, within six months or such further time as the circuit court or judge shall allow, file his report and account. If he neglects to do so, any creditor may apply to the circuit court for an account or settlement. The assignee may apply to the court for a final settlement of his account.[3]

In Oregon, it is provided that the assignee shall at all times be subject to the order of the court or judge, and the said court or judge may, by citation and attachment, compel the assignee from time to time to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by the act.[4]

In Indiana, the assignee, after the expiration of one year after entering upon the duties of his trust, or the next term of the court thereafter, is required to make a final report, and upon the hearing and determination thereof, if the judge is satisfied with and approves the same, he shall order the trustee to be discharged from his trust.[5]

In New Hampshire, within one year from the time of his appointment, and at such other times as the judge may direct, the assignee, upon due notice, shall settle with the judge of probate an account of his doings, and of the property in his hands, and the amount of his charges for services and disbursements, which, with the decree of the judge thereon, shall be filed in the office of the register of probate.[6] And on the settlement of the account, the judge may order a distribution in like manner as is provided for the settlement of estates of deceased insolvents.[7]

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[1] Laws of 1874, c. 483, § 111.
[2] Ibid. § 112.
[3] R. S. of Wis. (1878), § 1701.
[4] Laws of 1878, p. 38, § 9.
[5] Stat. of Ind. (G. & H.) p. 117, § 18; R. S. (1881), § 2679.
[6] Gen. Stat. (ed. 1878), p. 338, § 21. [7] Ibid. § 22.

§ 452. *Accounting Under Statutory Provisions.*—In Pennsylvania, an accounting upon the part of any assignee may be compelled, on the application of any person interested, or co-trustee, or co-assignee, to exhibit his accounts before the Court of Common Pleas, of the proper county[1] (such courts being clothed with the same powers as the several orphans' courts of the commonwealth).[2] The general course of proceeding, as indicated by the statute, is as follows: On the application being made, a citation is issued by the court to the assignee, requiring him to appear and exhibit, under oath or affirmation, the accounts of the trust in the said court, within a certain time, to be named in the citation.[3] The accounts being exhibited and filed, the court direct their prothonotary to give public notice of such exhibition and filing, setting forth in such notice that the accounts will be allowed by the court at a certain time stated, unless cause be shown to the contrary.[4] The courts are authorized to refer all accounts exhibited to them, to an auditor or auditors appointed for the purpose, who are sworn well and truly to audit and adjust the same, and make a true report thereof according to the evidence.[5] And the courts and their auditors are empowered to examine assignees upon oath or affirmation, touching the execution of the trust, and to compel the production of any books, papers, or other documents necessary to a just decision of any question before them.[6] Exceptions may be filed to the auditor's report. If the court confirm the report, distribution is decreed in accordance with it. The decree confirming the report may be appealed from to the Supreme Court.[7]

[1] Act of June 14, 1836, § 7; Dunlop, 688; Purd. Dig. (Brightley, 10th ed.) p. 1416, pl. 7.

[2] Id. § 33; Dunlop, 692; Purdon, p. 1419, pl. 33.

[3] Id. § 7; Dunlop, 688; Purdon, p. 1416, pl. 7.

[4] Id. § 9; Dunlop, 689; Purdon, p. 1417, p. 10.

[5] Id. § 31; Dunlop, 692; Purdon, 1419, pl. 31.

[6] Id. § 32; Purdon, 1419, pl. 32. An assignee, when before the auditor, may elect to pay to an adverse claimant, and if such claimant have the right, there can be no objection to the jurisdiction. In re Wilson, 4 Barr, 430.

[7] Keim's Appeal, 27 Penn. St. 42. One who has no interest in the effects in

An assignee, after having accepted the trust and received moneys under it, is not relieved from the exhibition of a trust account by his having failed to give bond or to file an inventory as required by statute. Nor is he relieved from such exhibition by the reason that the assignments to him were but partial assignments, and that since their execution the debtors had made a general assignment of all their estate to another person in trust, to whom the first assignee had assigned all the property covered by the partial assignments.[1]

It is, however, provided by the same statute of Pennsylvania already cited, that an assignee may, with the leave of the court having jurisdiction, make a *voluntary settlement* of his accounts, so far as he may have executed the trust; and the same being filed in the office of the prothonotary of the court, the like proceedings shall be had thereon as in the case of a settlement of such accounts after citation.[2] And it has been held in the same State, that a settlement and division by an assignee of the estate assigned to him, with the knowledge, assent and approbation of all the parties in interest, is just as effective as if made by a formal decree of a court possessing competent jurisdiction.[3]

§ 453. In Missouri, it is provided by statute that every

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the hands of the assignee, will not be permitted to except to his account. McCabe's Account, Sup. Ct. Pittsburg Leg. J. February 25, 1854. For the construction of the act of June 14, 1836, see Whitney's Appeal, 22 Penn. St. 500. The jurisdiction of the Court of Common Pleas is given by the 13th section of the Act of June 16, 1836. Id. ibid.

[1] Whitney's Appeal, 22 Penn. St. 500; Ludington's Petition, 5 Abb. N. C. 307; Matter of Farnam, 75 N. Y. 187.

And an assignee cannot be discharged without an accounting, even where there has been a composition between the assignor and his creditors. Matter of Horsfall, 8 Daly, 190.

[2] Act of June 14, 1836, § 14; Dunlop, 689; Purd. 1419, pl. 9. As to an accounting by one of two assignees, see Stell's Appeal, 10 Barr, 149; Matter of Gray's Estate, 10 Barr, 149. In the late case of McLellan's Appeal (26 Penn. St. 463), the assignee filed his first account, embracing the proceeds of the personal estate, and the balance remaining in his hands was distributed among the creditors. He afterwards filed a second and final account, embracing the proceeds of the real estate, which was confirmed, and an auditor appointed to distribute the balance.

[3] Estate of Latimer, 2 Ashm. 520.

assignee shall exhibit, on oath, a statement of the accounts of the trust, with proper vouchers, to the circuit court at its first regular term after the execution of the assignment, unless for good cause postponed, and shall file a like statement at each regular term of said court thereafter, until such assigned estate is fully settled; and if such assignee shall fail to make such settlement within the first three days of the term of such circuit court, then, on the application of any person interested, the court shall order a citation to issue to such assignee, requiring him to appear in court within a time to be therein named, and exhibit, on oath, a statement of his said accounts; and if said assignee shall neglect and fail to exhibit such accounts within the time named in said citation, the said court shall, on motion, unless for good cause shown, dismiss said assignee from his trust.[1] The court shall direct the clerk to give notice of the exhibition and filing of the accounts, for such time and in such public newspapers as it shall appoint, and that the accounts will be allowed by the court at a time to be stated in the notice, unless good cause to the contrary be shown.[2]

In Minnesota, all proceedings under the assignment act are subject to the order and supervision of the judge of the district court, and such judge may, from time to time, in his discretion, on petition of one or more of the creditors, by order, citation, attachment, or otherwise, require the assignee to render accounts and file reports of his proceedings and of the condition of the trust estate, and may order or decree distribution thereof. Provision is also made for a discharge of the assignee when he has fully completed his trust.[3]

§ 454. In Vermont, it is provided by statute, that if, in the opinion of any one of the creditors of the assignor named in the assignment, the assignee shall neglect to close

[1] R. S. (1879), § 369.

[2] Id. § 370.

[3] Stats. of Minn. (1878), p. 546. If the assignee fails to file his report as required by Gen. Laws of 1876, c. 44, § 10, he can be compelled to do so on the petition of the assignor himself as a "person interested in the estate." Clark v. Stanton, 24 Minn. 232; see also Thompson v. Childress, 1 Tenn. Ch. (Cooper), 369.

up a settlement of his trust, and file a copy of his account with the county clerk,[1] for an unreasonable length of time, such creditor may apply to the chancellor of the circuit for an order upon the assignee to close a settlement of his trust, and file with the clerk a copy of his trust account, verified by the oath of the assignee, by such time as the chancellor deems proper.[2] And the chancellor is empowered to hear such application upon notice given to the assignee, and to make necessary and proper orders in the premises, and to allow or refuse costs, &c., and to enforce orders made by him, and to proceed against the assignee for disobedience to his order as for a contempt.[3]

§ 455. Under the New York statute of 1860, as amended, it is provided,[4] that after the lapse of one year from the date of such assignment, the county judge[5] of the county where such inventory is filed shall, upon the petition of any creditor of such debtor or debtors, have power to issue a citation or summons compelling such assignee or assignees to appear before him and show cause why an account of the trust fund created by any such assignment shall not be made, and to decree payment of such creditor's just proportional part of such fund; and such county judge shall also have the same power and jurisdiction to compel such accounting as is now possessed by surrogates in relation to the estates of deceased persons; and also power to examine the parties to such

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[1] See *ante*, p. 680.

[2] Rev. L. (1880), § 1892.

[3] Ibid. § 1893.

[4] Laws of 1860, c. 348, § 4; 3 Rev. Stat. (6th ed.) p. 32; Fay's Dig. vol. I, p. 394. This section has been four times amended. See Laws of 1867, c. 860; Laws of 1870, c. 92; Laws of 1872, c. 838; Laws of 1875, c. 56. In its present form the section is verbatim as in the act of 1860, with the addition of the last clause relating to references. See Laws of 1877, c. 466; Laws of 1878, c. 318, *post*, p. 686, n. 1.

[5] The term county judge, as employed in the act of 1860 and amendments, includes the judges of the Court of Common Pleas for the city and county of New York, and the jurisdiction conferred upon the county judge is rightfully exercised by the judges of that court when the debtor resides in the city of New York. In the Matter of Morgan, 56 N. Y. 629.

Where proceedings are pending to test the validity of the assignment, and also to seek to obtain the trust property, by an assignee in bankruptcy, and there is no collusion, the accounting under the State statute should be postponed until a definite result is reached. Matter of Duncan, 1 Abb. N. C. 404.

assignment, and other persons, on oath, in relation to such assignment and accounting, and all matters connected therewith, and to compel their attendance for that purpose; and the parties interested in such accounting shall have the same rights to appeal from any order or decree of such judge in the premises as is now given from the decrees of surrogates in relation to the accounts of executors and administrators. And such judge shall have the power to refer the said accounting to a referee or auditor, to be appointed by him for that purpose, to take and state such account; and such referee shall have the same power to take the examination of any witnesses produced before him, and to compel their attendance and examination as a referee appointed by the Supreme Court to try and determine an action therein.[1]

No judgment is necessary to warrant the proceedings of the creditor under this section. All that is necessary is, that the creditor shall be entitled to a proportional part of the trust fund provided by the assignment for his benefit.[2]

To give the county judge jurisdiction, it is sufficient that the petition is verified and substantially alleges that the petitioner is a creditor, even though the truth of the allegation be denied by the assignee in his answering affidavit.[3]

The court has no power to compel the assignee to account and pay over to the creditors until the lapse of one year from the date of the assignment,[4] and it seems that the

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[1] The Laws of 1860, c. 348; of 1875, c. 56; of 1877, c. 466, as amended by the Laws of 1878, c. 818, authorize the county judge to appoint a referee "*to take and state such account;*" while the Laws of 1872, c. 838, authorize the appointment of a referee *to take and report the evidence* in regard to such account. An order appointing a referee, made pursuant to the statutes first above cited, should not direct him "to hear and determine," that being a judicial function which the county judge under those statutes cannot delegate. Levy's Accounting, 1 Abb. N. C. 177. And a referee appointed under the statute of 1872 must not be directed *to take and state the account* of the assignee, because his statutory power is limited to taking and reporting the evidence. Matter of Morgan, 56 N. Y. 629. Any report of a referee may be confirmed upon consent of all the creditors. Matter of Weinhaus, 5 Abb. N. C. 355.

[2] People v. Chalmers, 1 Hun, 683.

[3] Matter of Farnam, 75 N. Y. 187.

[4] Matter of Nelson, 11 Abb. Pr. 352.

assignee will not be compelled to pay over any part of the fund until a final accounting has been had between the assignee and all the creditors in any way, no matter how remotely, interested in the trust fund.[1]

The county judge has power by statute to require the assignee to render and file an account of his proceedings, and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with a surrogate's order for an account, and to decree payment of any creditor's just proportional share of the fund.[2]

In California, it is provided that after six months from the date of the assignment, the assignee may be required, on petition of any creditor, to account before the county judge of the county where the inventory was filed, in the manner prescribed by the insolvent laws of the State.[3]

And in Iowa, the assignee is at all times subject to the order and supervision of the court or judge, and may be compelled by citation and attachment to file reports of his proceedings, and to proceed in the faithful execution of the duties required.[4]

In Ohio, at the expiration of eight months from the appointment and qualification of the assignee or trustee, and as often afterwards as the court may order, an account must be filed with the court by the assignee or trustee in a prescribed manner. Whenever, on settlement, the same shall show a balance in the hands of the assignee or trustee subject to distribution among the general creditors, a dividend

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[1] Matter of Nelson, 11 Abb. Pr. 352.

[2] Laws of 1878, c. 318, amending Laws of 1877, 466, § 20; 3 R. S. (7th ed.) p. 2280. The county court may, upon the application of a creditor, require the assignee to render an account, and this without bringing in all the parties interested in the estate, or proceeding to a final settlement. Matter of Cowing, 26 Hun, 214.

As to the power of the surrogate on an accounting, see Matter of Uglow, 51 How. Pr. 342; Campbell v. Bruen, 1 Bradf. 234; Tucker v. Tucker, 4 Keyes, 136.

[3] Code, § 3469; Hitt. § 3469; see Insolvents, Hitt. §§ 15, 505.

[4] Iowa Code (1880), p. 571, § 2123.

must be declared by the probate judge, payable out of such balance, equally among all the creditors entitled, in proportion to the amount of their respective claims against the assignor, including those disallowed, as to which the claimant has begun proceedings to establish, and claims held under advisement. Notice must be given by advertisement of the making of the dividend and of the time and place of its payment. The dividends reserved for disallowed claims are retained until the termination of the proceedings.[1]

In Illinois, at the first term of the county court after the expiration of the three months allowed for presenting claims, there being no exception to such claims or such exceptions having been adjudicated, the court must order the assignee to make from time to time fair and equal dividends in proportion to the claims, and as soon as may be, and within one year thereafter, to render a final account of the trust to the court.[2]

The dividends reserved for disallowed claims are retained until the termination of the proceedings.

§ 456. In some instances, very informal statements have been allowed as an accounting. Thus, in Vermont, where, after an assignment for the benefit of creditors, some of the creditors agreed in writing (which agreement was appended to the assignment), to receive the dividends which might accrue to them, "after a *faithful accounting* by the assignees, and await the same;" and the surviving assignee notified the creditors that he was ready to pay a dividend of twenty-five per cent. upon their claims, and that was all he could pay, and more than they would be entitled to receive upon a strict accounting; and it did not appear upon what basis the dividend was thus declared, nor that there was any fraud, nor that any more was retained by the assignee than a reasonable compensation for his services and expenses, it

[1] Rev. Stat. of Ohio (1880), § 6356.

[2] R. S. of Ill. (Cothran, 1880), p. 119.

was held that this was substantially an "accounting," within the meaning of the agreement.[1]

§ 457. *Accounting in Equity.*—But though no formal accounting is required by statute, the creditors are always entitled to an account, and if this be refused or insufficiently granted, they may proceed to compel an account by bill in equity or other equivalent proceedings. The method of procedure upon such accounting is regulated by the practice and rules of courts of chancery in the several States,[2] and proceeds under the general jurisdiction of courts of equity over trusts and trustees. The action may be brought in the name of any creditor, in behalf of himself and all other creditors.[3]

If such actions are brought by different creditors in behalf of themselves respectively and the other creditors, the court has power to make an order compelling all the creditors to come in and prove their claims in the suit first brought, and to stay the other actions.[4]

The action is properly referable to a referee, or master in chancery, and may be directed to determine primarily whether the assignee should account, and if so, to take the account upon due notice to all creditors to come in and present their claims, before a day fixed for that purpose.[5] Creditors who fail to so present their claims, and appear before the referee, are barred from any claim against the assignee, although they had no actual notice of the proceedings, and that even though the assignee from other sources had knowledge of the claim of the creditor.[6]

This was the former rule in equity, but is not applicable under the general assignment acts of 1877, c. 466, and 1878, c. 318.[7]

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[1] Foster v. Deming, 19 Vt. 313. But see the statute provisions, *ante*, pp. 682–688.

[2] Barb. Chan. Pr. 505, *et seq.*

[3] Duffy v. Duncan, 35 N. Y. 187.

[4] Travis v. Meyers, 67 N. Y. 542; Innes v. Lansing, 7 Paige, 583. Provided all the creditors are made parties to the first suit. See Schuehle v. Reiman, 86 N. Y. 270; Petrie v. Petrie, 7 Lans. 90; Petrie v. Lansing, 66 Barb. 357.

[5] Kerr v. Blodgett, 48 N. Y. 63; Duffy v. Duncan, 35 N. Y. 187.

[6] Kerr v. Blodgett, 48 N. Y. 63.

[7] Matter of Currier, 8 Daly, 119.

§ 458. *Close of the Trust.*—The time for closing the trust is sometimes fixed by the assignment itself.[1] If no time be limited the assignee will be allowed what may be considered, under all the circumstances, a reasonable time for the purpose.[2]

Sometimes the trust will be considered as closed by lapse of time. As a general rule of equity, an assignee in trust cannot set up the statute of limitations against his *cestui que trust*, such direct trusts not being within the statute. The possession of the trust fund in the hands of the trustee or assignee, is the possession of the *cestui que trust* for creditors, and is not held adversely to them. But after twenty years, the law presumes the debts paid and the trust executed, so far as respects creditors.[3] It has been held, however, in Pennsylvania, that the lapse of seventeen years without corroborating circumstances was too short a time to raise a legal presumption that the objects of an assignment have either been accomplished or abandoned.[4]

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[1] Dana v. Bank of U. S. 5 W. & S. 223.

[2] Cunningham v. Freeborn, 11 Wend. 241; Stevens v. Bell, 6 Mass. 339; Farmers' Bank v. Douglass, 11 Sm. & M. 469, 539; Gibson v. Rees, 50 Ill. 383; In re Estate of Potter & Paige, 54 Penn. St. 465; Mellish's Estate, 1 Pars. (Penn.) Sel. Cases, 482; and see Morrison v. Brand, 5 Daly, 40; see 2 Perry on Trusts, pp. 555, *et seq.* And by a recent statute in New York, it is provided that "where the purposes for which an express trust shall have been created, shall have ceased, the estate of the trustee shall also cease, and where an estate has been conveyed to trustees for the benefit of creditors, and no different limitation is contained in the instrument conveying the trust, such trust shall be deemed discharged at the end of twenty-five years from the creation of the same; and the estate conveyed to trustee or trustees, and not granted or conveyed by him or them, shall revert to the grantor or grantors, his or their heirs or devisees, or persons claiming under them, to the same effect as though such trust had not been created." Laws of 1875, c. 545; 3 Rev. Stat. (7th ed.) p. 2183, § 67. But this statute does not operate retrospectively. McCahill v. Hamilton, 20 Hun, 388.

[3] Coates' Estate, 2 Pars. (Penn.) Sel. Cases, 258; Gibson v. Rees, 50 Ill. 382; Hunter v. Hubbard, 26 Tex. 537. In the last case it is said: The statute does not begin to run in favor of the trustee, so long as the trust continues and is acknowledged to be a continuing subsisting trust, for the reason that the possession of the trustee is the possession of the *cestui que trust*. But if he claim to hold the trust fund as his own, and adversely to the *cestui que trust*, and the latter has knowledge of the fact, then, from the time of such adverse holding, the statute will run in favor of the trustee. And so in general when the relation is terminated by a breach of trust. Wickliffe v. The City of Lexington, 11 B. Mon. 161.

[4] Adlum v. Yard, 1 Rawle, 163.

The trust may also be determined by the acts of the parties. A trust to sell real estate for the payment of debts ceases when the debts are, in any mode, paid or discharged. Thus, in a case in New York, where a debtor conveyed lands to trustees, upon trust to sell the same for the benefit of certain specified creditors, and to reconvey to himself such parts of the property as should remain unsold after satisfying the trusts; and afterwards conveyed his residuary interest in the property to the same trustees, for the benefit of the same creditors, and in satisfaction of their demands; the creditors, on their part, accepting the trust fund as a satisfaction of their claims, it was held that the original trust was determined, and that the whole legal and equitable title to the property became vested, under the statute,[1] in the creditors.[2]

[1] 1 Rev. Stat. 728, §§ 47, 49; 3 R. S. (7th ed.) p. 2180.

[2] Selden v. Vermilya, 3 N. Y. 525; see Earle v. N. Y. Life Ins. Co. 7 Daly, 303.

CHAPTER XL.

LIABILITY OF ASSIGNEES.

§ 459. The liability of an assignee in trust for creditors, though sometimes expressly assumed in terms, as where he becomes a formal covenanting party to the assignment, follows, independently of any such express undertaking, as a legal consequence of his acceptance of the trust. It is a liability which attaches to his office as a trustee; and it operates as a security for the faithful performance of that office, for the benefit of those whose interests are so extensively confided to him.

An action at law cannot be maintained against the assignee to recover the amount of a debt due a creditor, on the ground that the assignee has neglected to collect an amount due upon the sale of assigned property, and apply it to the payment of the creditor in discharge of the trust.[1] But it seems that a count against trustees as such may be joined with a count against them personally.[2] In order to maintain his action, the creditor must show not only that the estate, but that he, personally, has been injured by the wrong complained of. Thus, a creditor of an inferior class, under an assignment containing preferences, cannot sustain his action against the trustee for wasting the assets, without showing that the assets were sufficient to pay the creditors preferred to him in full.[3]

How far the assignor will be protected from the claims

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[1] Bishop v. Houghton, 1 E. D. Smith, 566.

[2] Rush v. Good, 14 S. & R. 226; but see Mitchell v. Kendall, 45 Me. 234.

[3] Davenport v. McCole, 28 Ind. 495.

In Caldwell v. Coates (78 Penn. St. 312), a firm assigned to three of its creditors and put them in possession of their factory to conduct the business, and from the proceeds to pay these creditors and other liabilities. This was held to impose on the assignees only a liability to account; and in an attachment against the assignors—the assignees being garnishees—the plaintiffs must show that the

of creditors where the assigned property was insufficient to pay the indebtedness, but has been wasted or misapplied by the assignees, is a question not free from doubt. It has been said that where the assignee is selected by the debtor, the waste of the assets by the assignee is no defense, but that the rule is otherwise where the assignee is selected by the creditors.[1]

§ 460. *Extent of Liability.*—The liability of an assignee is, for the most part, commensurate with the *duty* which the assignment imposes upon him.[2] This duty may, in its most general terms, be stated to be—to observe good faith in all his transactions, and to exercise all reasonable diligence and carefulness in the management of the trust. Hence, a want of good faith or of proper diligence will subject him to any loss which may be consequent upon it.[3]

For gross misconduct, or a violation or abuse of the trust, such as a willful misapplication of the trust funds in his hands, an assignee is not only personally responsible,[4] but may be dismissed from office.[5] But *negligence*, either in the collection and recovery of the property assigned, or

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garnishees had assets in their hands liable to attachment, and must make out a case of indebtedness sufficient to recover in *assumpsit*. As to the liability of an assignee as garnishee, see Smith v. Miflett, 11 R. I. 528.

In Peters v. Light (76 Penn. St. 289), a debtor assigned all his estate to assignees and those elected by creditors to succeed them to carry on his iron manufactory, with power to distribute the estate at the discretion of creditors. The trustees advanced money and made iron. It was held that, this being the product of the capital and labor of the trustees, a non-assenting creditor of the assignor could not seize the iron on execution.

[1] Hargrooves v. Chambers, 30 Ga. 580; see Bailey v. Bergen, 67 N. Y. 346.

In Gschwend v. Estes (51 Cal. 134), it was held that if a debtor agrees with his creditors that a person named shall take charge of his property as trustee for the creditors, with authority to sell the property and apply the proceeds to the payment of the debts, and the trustee accepts, and the creditors control the trustee in the management of the business, the debtor is entitled in equity to have the proceeds in the hands of the trustee applied as a credit on the debts, and is not compelled to look to the trustee for the same, if he fails to make a proper application of such proceeds.

[2] It has, however, been said that the liability of trustees is not measured by the abstract rule of their duty. Hext v. Porcher, 1 Strobh. Eq. 170.

[3] Freeman v. Cook, 6 Ired. Eq. 373.

[4] Williams v. Otey, 8 Humph. 563; see Winn v. Crosby, 52 How. Pr. 174; Clark v. Gibboney, 3 Hughes, 391; Dorr v. Gibboney, Id. 382.

[5] See *post*, Chap. XLI.

in the custody and management of it, or in the final disposition of it by sale and payment to creditors, is the ground upon which assignees are, in practice, most frequently held liable. Thus, a trustee is answerable for property or money lost by his gross negligence.[1] But an assignee's liability is not confined to *gross* negligence, nor can it be so limited by any stipulation on his part, in the deed of assignment. This was so decided in a case in the Superior Court of the city of New York,[2] in which the subject was well considered, and the general rule stated to be that a trustee is bound to manage and employ the trust property for the benefit of the *cestui que trust*, with the care and diligence of a provident owner.[3] Consequently he is liable for every loss sustained by reason of his negligence, want of caution, or mistake, as well as for positive misconduct.[4] On this ground of *ordinary* negligence, assignees have been held liable for neglecting to recover debts assigned;[5] for omitting

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[1] Hurtt v. Fisher, 1 Harr. & Gill, 88; Meacham v. Sternes, 9 Paige, 398, 405.

In Rodman v. Nathan (45 Mich. 607), the assignor resumed control of the goods and the assignee brought replevin. It was held that losses by the assignee's negligence could not be charged on him in this or any suit at law; that the remedy was in equity.

Where it appears by the findings of an auditor that the assignee has been guilty of willful and supine negligence he will be surcharged, and where the surcharge is imposed for negligence and mismanagement in the disposal of the assigned property, the correct rule is that the difference between the price which the assignee received and the price which he might have received is to form the basis of the surcharge. In re Wear, 1 Luz. Leg. Reg. 104.

[2] Litchfield v. White, 3 Sandf. S. C. 545; affirmed by the Court of Appeals, 7 N. Y. 438.

[3] Willis on Trustees, 125, 169; Goodwin v. Mix, 38 Ill. 115; Davis v. Harman, 21 Gratt. 200; Olmsted v. Herrick, 1 E. D. Smith, 310.

[4] Willis on Trustees, 172, 173; 2 Kent's Com. 230; cited by Sandford, J., 3 Sandf. S. C. 551; and see the observations of Ruggles, C. J., in Litchfield v. White, 7 N. Y. 443, 444.

[5] Royall's Adm'r v. McKenzie, 25 Ala. 363; Winn v. Crosby, 52 How. Pr. 174, cited *ante*, p. 644.

Where a debtor conveyed his property in trust to pay certain debts divided into three classes, and one of the second class creditors directed the trustee to withhold from collection an amount sufficient to pay his debt, which was done, and the note so withheld by the trustee became worthless, but not through any default of the trustee, it was held that the creditor was not entitled to a *pro rata* share of the money collected for the benefit of the second class creditors, and that the trustee was not liable therefor. Bason v. Harden, 72 N. Ca. 287.

to recover assigned property from the debtor;[1] and for permitting the debtor to retain possession of assigned property and receive the proceeds.[2] So, where a trustee, after accepting and acting under the trust, neglected to record the trust deed, he was charged with a loss resulting therefrom.[3] On the same principle, assignees who delay the collection of debts,[4] or neglect to apprise creditors of dividends due to them, are chargeable with interest.[5] In the case of a trust deed in Virginia, to secure the payment of debts, where the trustees having sold a portion of the trust property to three partners, all men of wealth, without taking security for the purchase money, suffered them to retain it for a number of years, until they all became insolvent, they were held personally responsible for the amount of the purchase money.[6] In a case in Vermont, it was held that if an assignee barter away the trust property, in exchange for other property, he will be charged with the value of the property at the time of the exchange, and the interest,

[1] Pingree v. Comstock, 18 Pick. 46. And where the assignee had paid a dividend to all the creditors excepting one, to whom he paid nothing, and had through motives of charity permitted one claim to remain uncollected until it was barred by the statute of limitation, it was held that the assignee was personally liable to the unpaid creditor, to the amount of the uncollected claim. Simpson v. Gowdy, 19 Ind. 292; and see Blackburne's Appeal, 39 Penn. St. 160.

[2] Harrison v. Mock, 16 Ala. 616. As to the measure of the trustee's liability in such case, see Id. ibid.

[3] Cooper v. Day, 1 Rich. Eq. 36; see Hext v. Porcher, 1 Strobh. Eq. 170.

[4] Royall's Adm'r v. McKenzie, 25 Ala. 368.

[5] For any mere delay in payment, interest is, in law, regarded as a sufficient compensation. Clark v. Craig, 29 Mich. 398. But an assignee will not be charged with interest where the creditor neglected to make a demand for his dividend for a period of three years. Tomlinson v. Smallwood, 15 N. J. Eq. 286.

An assignee will be charged with interest on balances on his hands, where he has neglected to perform his duties faithfully. Assigned Estate of Truitt, 10 Phila. 16.

[6] Miller v. Molcombe's Ex'r, 9 Gratt. 665. Where an assignee, under a trust deed for creditors, had collected in June, 1861, in good money, a part of the trust fund applicable to pay a creditor who was ready to receive payment, and invested the fund in confederate bonds, under the order of the court, made in a suit brought by the trustee to obtain instructions as to the administration of the estate, he was, after the close of the war, held liable for the fund in good money. The assignee was not held liable for interest on the fund during the continuance of the war. Kirby v. Goodykoontz, 26 Gratt. 298; see Davis v. Harman, 21 Gratt. 194; Dorr v. Gibboney, 3 Hughes, 382; Clark v. Gibboney, Id. 391.

unless those in interest elect to affirm the exchange.[1] And in a case in Alabama, it has been held that if a trustee, without the sanction of the *cestui que trust*, receives lands in settlement and satisfaction of the trust debts, equity will hold him responsible for whatever loss may ensue, and if the *cestui que trust* so elect, treat the lands as his own individual property.[2]

In a case in Pennsylvania,[3] the assignee, being informed that a debtor of his assignor had no title to lands held by the latter as security, made no proper investigation, but took from the debtor other securities, and reconveyed the land to him. The debt having been lost, the assignee was held liable for the amount on the ground of supine negligence.

The rule recognized in Maryland is that when a trustee has acted in good faith, in the exercise of a fair discretion, and in the same manner as he would ordinarily do in regard to his own property, he ought not to be held responsible for any losses accruing in the management of the trust property.[4]

Cases of *mistake* have sometimes been considered as exceptions to the general rule of an assignee's or trustee's liability.[5] Thus, in a case in South Carolina, where a trustee, by a mistake honestly made, had a deed recorded in the wrong office of registration, it was held that this was not sufficient to render him liable.[6] The court, in this case, took occasion to observe that "the liability of trustees is not measured by the abstract rule of their duty. The universal test of their liability or exemption from liability is this: Is there, or is there not, in this case, evidence of faithful endeavors to perform his duty?" It is clear, however,

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[1] Page v. Olcott, 28 Vt. 465, 469.

[2] Royall's Adm'r v. McKenzie, 25 Ala. 364; Blauvelt v. Ackerman, 20 N. J. Eq. 141.

[3] Chambersburg Association's Appeal, 76 Penn. St. 203.

[4] Gray v. Lynch, 8 Gill, 403; and see Higgins v. Whitson, 20 Barb. 141; Melick v. Voorhis, 24 N. J. Eq. 305.

[5] In re Durfee, 4 R. I. 401; Perry on Trusts, 562.

[6] Hext v. Porcher, 1 Strobh. Eq. 170.

that mere mistake or misapprehension of duty, however honest, will not always protect an assignee from consequent liability. Thus, in a case in Massachusetts, where, under an assignment directing certain preferred creditors to be paid in full, the assignee, in good faith, and through a misconception of his duties, or a misconstruction of the assignment, paid all the money which he had received in trust to other creditors, it was held to be no defense to a bill filed against him by a preferred creditor, whom he had neglected to pay, but he was charged with the amount of such creditor's demand with interest.[1] In a case in Alabama, it has been held that a trustee who applies the trust fund in his hands to the payment of one creditor, leaving the remainder of the creditors wholly unpaid—the deed under which he acts contemplating a payment *pro rata* among all the creditors—acts at his peril and is individually responsible to them.[2] A trustee may not be accountable for an honest mistake, but when his duty is so plain that no man of ordinary intelligence could mistake it, he is responsible if he have such intelligence. He cannot shield himself from responsibility by doubts that he takes no measures to either verify or dispel.[3]

An assignee may, in most cases, secure himself against mistake, or where he is in doubt as to the line of his duty, by taking the advice of counsel; and for reasonable fees for such advice, he will be allowed in his account.[4] But even the advice of counsel will not protect him from the consequences of a failure to discharge his duty properly, but in a case of doubt he should apply to a court of equity.[5]

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[1] Ward v. Lewis, 4 Pick. 518. In a case in England, where trustees, without sufficient cause, doubted the identity of their *cestui que trust*, and in breach of trust paid the trust fund to others, they were ordered to make good the same, and pay the costs and interest at five per cent., the accounts to be taken with rests. Hutchins v. Hutchins, 15 Jur. 869; s. c. 6 Eng. L. & Eq. 91.

[2] Pinkston v. Brewster, 14 Ala. 315. And where the assignees, after a federal court had acquired jurisdiction, submitted to the jurisdiction of a State court, without opposition, and passed over to a receiver appointed by it, the assets of the trust, they were held personally liable for them all. Chittenden v. Brewster, 2 Wall. 191.

[3] Gilbert v. Sutliff, 3 Ohio St. 129.

[4] Jones v. Stockett, 2 Bland, 409; Booth v. Conn. Mut. Ins. Co. 43 Mich. 299.

[5] Freeman v. Cook, 6 Ired. Eq. 373.

The rule is, that when a trustee is in doubt as to any matter arising in the execution of the trust, he may wait till a bill is brought against him, or he may bring a bill seeking the direction of the court.[1] An important instance of a bill filed for this purpose occurred in the case of Pratt v. Adams,[2] in the Court of Chancery of New York, alluded to on a former page.[3] Chancery, it is said, will assist and protect trustees in the performance of trusts committed to them whenever they seek the aid and direction of the court, as to the establishment, management, or execution of them.[4] And where a bill for such purpose is filed *bona fide* by the trustees, the costs will be decreed to be paid out of the trust estate.[5]

In a case in Maryland,[6] the defendants were trustees under a deed of trust, and were authorized by order of court to complete certain houses conveyed to them by the deed. They were held individually liable for work and material furnished by the plaintiff upon their order, it appearing that the plaintiff had not agreed to look to the trust estate alone. The order of the court was a complete indemnity to the trustees for having the work done, but it did not bind the plaintiff to look exclusively to the trust fund for payment, unless he expressly agreed to do so.

§ 461. *Assignees, when Protected.*—It is a further and important general rule under this head, that assignees and trustees acting in good faith under an assignment or other instrument which is afterwards declared void by judicial decree, will be protected from liability, and their acts under such instrument will be ratified and confirmed.[7] Thus, in

[1] Dimmock v. Bixby, 20 Pick. 368; Wilde, J., Id. 374, 375; Lockwood v. Slevin, 26 Ind. 124; Anon. v. Gelpcke, 5 Hun, 245. And creditors may also apply for directions to the assignee. Wilson v. Brown, 12 N. J. Eq. 246.

[2] 7 Paige, 615.

[3] See *ante*, p. 648.

[4] Trotter v. Blocker, 6 Port. 269.

[5] Trotter v. Blocker, *ubi supra;* Harvey's Adm'r v. Steptoe, 17 Gratt. 289; Booth v. Conn. Mut. Ins. Co. 43 Mich. 299.

[6] Gill v. Carmine, 55 Md. 339.

[7] See Hawley v. James, 16 Wend. 61, 182; Barney v. Griffin, 4 Sandf. Ch. 552; affi'd 2 N. Y. 365.

New York, it has been repeatedly held that assignees acting under a fraudulent assignment will not be held accountable for proceeds of the assigned property which they have actually paid over to *bona fide* creditors of the assignor, in pursuance of the assignment, before any other creditors have obtained a lien (general or specific, legal or equitable) upon the assigned property.[1] So in New Hampshire and Massachusetts, where trustees under fraudulent conveyances have paid the proceeds of the property assigned to them to *bona fide* creditors before the service of process upon them, they have been discharged from liability, on the ground that there remained nothing in their hands that could be subjected to a judgment.[2] So in Pennsylvania, assignees under an assignment which was void on the ground of not having been recorded within the time prescribed by the statute, were held to be not liable in an attachment, at the suit of creditors not coming in under the assignment, for moneys collected and paid over before the attachment, in pursuance of the assignment.[3] And a voluntary assignee was protected in payments made by him to his *cestuis que trust*, under a fraudulent assignment, before an adverse claim by an insolvent trustee and bankrupt assignee.[4] And more recently it has

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[1] Wakeman v. Grover, 4 Paige, 23, 24; Ames v. Blunt, 5 Id. 13; Averill v. Loucks, 6 Barb. 470, 471; Bostwick v. Berger, 10 Abb. Pr. 197; and see Grimsley v. Hooke, 3 Jones Eq. (N. Ca.) 4; Therasson v. Hickok, 37 Vt. 454; Fahnestock v. Bailey, 3 Metc. (Ky.) 48. But an assignee cannot divest himself of liability by merely surrendering an assignment and taking a new one upon different trusts. Meacham v. Sternes, 9 Paige, 398.

[2] Thomas v. Goodwin, 12 Mass. 140; Hutchins v. Sprague, 4 N. H. 469; approved in Crowninshield v. Kittredge, 7 Metc. 520.

[3] Stewart v. McMinn, 5 W. & S. 100.

[4] In re Wilson, 4 Barr, 430.

In Neill v. Jackson (8 Fed. Reptr. 144), a decree of a United States court required the voluntary assignee to deliver the assets to the assignee in bankruptcy. It was held that the voluntary assignee was entitled to the protection of such decree, notwithstanding, by consent of parties, he withdrew his appeal therefrom, and by the like consent the United States court modified its decree, it appearing that he acted under the advice of counsel. But the modified decree having excepted from the order directing the delivery of the assets to the assignee in bankruptcy, certain moneys which the voluntary assignee had collected, and claimed to have disbursed under the voluntary deed, it was held that, to the extent of the excepted fund, he might be compelled to settle an account of his trust in the State court having jurisdiction thereof.

been held in the same State, that a sale to a *bona fide* purchaser for a value, by assignees for creditors, under a deed voidable for a defect apparent on its face, cannot be avoided by the insolvent trustee of the assignors, where the sale was made before an election by the trustee to disaffirm the assignment.[1] And in a case in New York, the court, on setting aside a conveyance of all the debtor's real estate in trust, made provision for the ratification of sales in good faith by the trustees.[2]

§ 462. *How Assignees are dealt with.*—In regard to the mode in which assignees are dealt with by the courts, the rule has been stated to be: that where trustees act in good faith, and with due diligence, they receive the favor and protection of the court, and their acts are regarded with the most indulgent consideration; but where they betray their trust, or grossly violate their duty, or where they have been guilty of unreasonable negligence, their acts are inspected with the severest scrutiny, and they are dealt with according to the rules of strict, if not rigorous justice.[3]

The legal presumption always is that a trustee has faithfully executed his trust, unless the contrary is fully and satisfactorily evinced.[4]

§ 463. *Liability of Co-assignees.*—Where there are several assignees or trustees, the general rule is that they are responsible only for their own acts, and not for the acts of each other, unless they have made some agreement by which they have expressly agreed to be bound for each other, or have, by their own voluntary co-operation or connivance, enabled

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[1] Okie v. Kelly, 12 Penn. St. 323; and see Butler v. Jaffray, 12 Ind. 504.

[2] Barney v. Griffin, 4 Sandf. Ch. 652; affi'd, 2 N. Y. 365. As to the extent of the liability of assignees in Vermont, where the assignment is declared void, see Bishop v. Hart's Trustees, 28 Vt. 71.

[3] Dieffenderffer v. Winder, 3 Gill & Johns. 311. See to the same effect, the observations of Bennett, J., in Paige v. Olcott, 28 Vt. 465, 467, who adds: "It is necessary, in such cases, that rules somewhat of a stringent character should be established, to prevent speculation in trust funds, and to induce fidelity of conduct." And see the observations of Lee, J., in Miller v. Holcombe's Ex'rs, 9 Gratt. 665, 674; referring to Elliott v. Carter, Id. 541.

[4] Maccubbin v. Cromwell, 7 Gill & Johns. 157; Goodwin v. Mix, 38 Ill. 115.

one or more to accomplish some known object in violation of the trust.[1] An express clause, indeed, is frequently inserted in assignments, as in other trust deeds, that an assignee shall not be answerable for the receipts, acts or defaults of his co-assignees.[2] But it has been said of such a proviso, that while it informs the trustee of the general doctrine of the court, it adds nothing to his security against the liabilities of the office.[3]

In regard to receipts of money, the rule in England formerly was that co-trustees were considered responsible for money if they joined in signing the receipt for it, but in later times the rule has been established, that a trustee who joins in a receipt for mere conformity sake, shall not be answerable for a misapplication by the trustee who receives.[4] A trustee, however, will not be exempt from liability if he sign a receipt for money which the purposes of the trust do not require.[5] In New York, the liability of a trustee for moneys received by his co-trustee was fully considered by Chancellor Kent in the case of Monell v. Monell,[6] and the following rule deduced from the authorities cited, viz., that if two trustees join a receipt for moneys it is *prima facie*, though not absolutely conclusive, evidence that the money came to the hands of both; that one trustee may show by satisfactory proof that the joining in the receipt was necessary or merely formal, and that the moneys in fact were paid to his companion; that, without such satisfactory proof, he must be liable to the *cestui que trust*, and that if the moneys

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[1] 2 Story's Eq. Jur. § 1280; Lewin on Trusts, 269; Perry on Trusts, § 415. The rule in these words is said to have been adopted and acted on in Taylor v. Roberts, 3 Ala. 86; State v. Guilford, 18 Ohio, 509; Latrobe v. Tiernan, 2 Md. Ch. 480; Hill on Trustees (3d Am. ed.), 450, American editor's note: where reference is also made to Taylor v. Bonham, 5 How. (U. S.) 233; Worth v. McAden, 1 D. & B. Eq. 199; Boyd v. Boyd, 3 Gratt. 114; Miller v. Sligh, 10 Rich. Eq. (S. Ca.) 247; Glenn v. McKim, 3 Gill, 366; Stell's Appeal, 10 Barr, 149; Banks v. Wilkes, 3 Sandf. Ch. 99.

[2] See *ante*, p. 339. [3] Lewin on Trusts, 288; Perry on Trusts, § 415.

[4] Lewin on Trusts, 271, 272, citing Brice v. Stokes, 11 Ves. Jr. 319, 324, and other cases.

[5] Lewin on Trusts, 273; Hanbury v. Kirkland, 3 Sim. 265, cited ibid.

[6] 5 Johns. Ch. 283.

were in fact paid to his companion, yet if they were so paid by his act, direction or agreement, and when he had it in his power to have controlled or secured the money, he is and ought to be responsible.[1] In Wallis v. Thornton,[2] it was held by Chief Justice Marshall, that a trustee is not liable for money received by his co-trustee in the regular discharge of the trust, though he join in the receipt therefor; but where he joins in a receipt for money received by his co-trustee when he had no right to receive it, he will be considered as co-operating in the breach of trust, and will be liable.[3] In Massachusetts the rule has been adopted, that trustees are liable only for the money which they have actually received, and in a case where it appeared that one of the trustees under a voluntary assignment had received no property under the assignment, it was held that he could not be charged.[3]

Another rule established by the English cases is, that though a trustee joining in a receipt may be safe in merely permitting his co-trustee to be the receiver in the first instance, yet he will not be justified in allowing the money to remain in his hands for a longer period than the circumstances of the case may reasonably require.[4] In Brice v. Stokes,[5] where one of two trustees received certain purchase money, both signing the receipt, and the trustee who received the money died insolvent, without having accounted for it, and it was proved that the other was connusant of the mis-employment of the fund, though he took no active measures for recovering it out of his co-trustee's hands, he was made answerable. The same principle has received the sanction of the American courts. In New York, it was held by the chancellor, in Monell v. Monell,[6] that where, by the act or agreement of one trustee, a portion of the trust fund gets into the hands of his co-trustee, they are both responsible for it. And the same principle

[1] Kent, C., Id. 296; see 2 Story's Eq. Jur. § 1283.
[2] 2 Brock. 432.
[3] Ward v. Lewis, 4 Pick. 518, 524.
[4] Lewin on Trusts, 274.
[5] 11 Ves. Jr. 319.
[6] 5 Johns. Ch. 283.

has been adopted in North Carolina.[1] A trustee who suffers funds to pass improperly into the hands of his co-trustee, is chargeable for any loss arising from such negligence or abuse of trust.[2] And where a sole trustee, who was also joint trustee with another person, of another fund, suffered the several fund to be mingled with the joint fund, and to pass into the hands of his co-trustee, it was held that he was responsible for the property so misapplied, to a person who was *cestui que trust* in both funds, though such *cestui que trust* had discharged the co-trustee in ignorance of the mingling of the funds by the several trustee.[3] In Ohio, however, it has been held that where a loss accrues to a trust fund through the default of one of five trustees, his co-trustees will not be held responsible for such loss, if they have acted in good faith, and exercised that vigilance over the fund which a man of ordinary prudence will exercise over his own property.[4] And in Virginia, where a person named trustee in a deed to secure debts, united in sales necessary in the execution of the trust, and other formal acts, but received none of the trust funds, they being received by his co-trustee, and was guilty of no fraud in relation thereto, it was held that he was not responsible for the misapplication or waste of the funds by his co-trustee.[5]

A further rule established by the English cases is, that if one trustee be connusant of a breach of trust committed by another, and either industriously conceal it,[6] or do not take active measures for the protection of the *cestui que trust's* interest,[7] he will himself become responsible for the mischievous consequences of the act. A trustee is called upon,

[1] Graham v. Davidson, 2 Dev. & Batt. Eq. 155.

[2] Mumford v. Murray, 6 Johns. Ch. 1.

[3] Id. ibid; see Hart v. Bulkley, 2 Edw. Ch. 70.

[4] The State of Ohio v. Guilford, 18 Ohio, 500.

[5] Griffin's Ex'r v. Macaulay's Adm'r, 7 Gratt. 476. And for a fuller view of the American cases as to the liability of co-trustees generally, see the American editor's note to Hill on Trustees (3d Am. ed. Phil. 1857), 450.

[6] Boardman v. Mosman, 1 Bro. C. C. 68.

[7] Brice v. Stokes, 11 Ves. Jr. 319; and see Walker v. Symonds, 3 Swanst. 64; Oliver v. Court, 8 Price, 166; In re Chertsey Market, 6 Price, 279.

if a breach of trust be *threatened*, to prevent it by obtaining an injunction;[1] and if a breach of trust has been *already committed*, to file a bill for the restoration of the trust fund to its proper condition,[2] or at least to take such other active measures as, with a due regard to all the circumstances of the case, may be considered the most prudential.[3]

Nor is it any excuse for a trustee who has not himself taken an active part in the duties of the trust, that he had nothing to do with the conduct of his co-trustees, to whom he left the management of the business. This was expressly held by the Court of Exchequer, in the case of Oliver v. Court;[4] the Lord Chief Baron laying down the rule, that where several trustees leave the entire performance of the duties of the trust to one, all are equally responsible for the faithful and diligent discharge of their joint and several duty by that one to whom they have delegated it. The same doctrine was lately applied in New York, to the case of co-assignees; the court holding that if an assignee once accepts an assignment, he undertakes the duties of the office, and is responsible, although he takes no active part, but leaves the control to his co-assignee; and that in such case he is liable for the misapplication of the trust funds by his associate.[5] In Maryland, also, it has been held that it is not sufficient to exempt one of two joint trustees from liability, that the duties of the trust have been exclusively performed by the co-trustee, with the concurrence and consent of the former; on the contrary, he is accountable for the conduct and management of the co-trustee to whom he has thought proper to delegate his power, in the same manner and to the same extent as if they had been executed by himself.[6] In Alabama, a trustee who, after accepting the trust, voluntarily

[1] See In re Chertsey Market, 6 Price, 279.

[2] Franco v. Franco, 3 Ves. Jr. 75.

[3] See Walker v. Symonds, 3 Swanst. 64, 71; Lewin on Trusts, 287.

[4] 8 Price, 127. See 2 Story's Eq. Jur. § 1275.

[5] Bowman v. Raineteaux, Hoff. Ch. 150; see also Monell v. Monell, 5 Johns. Ch. 283.

[6] Maccubbin v. Cromwell, 7 Gill & Johns. 157.

permits his co-trustee to take the entire management of it, and the possession and control of the trust property, is equally with him liable to account.[1] And in Virginia, if property be conveyed to trustees, to secure the payment of the debts of certain creditors of the grantor, and the grantees accept the trust and undertake to dispose of the property, notwithstanding any agreement between themselves as to which shall take charge of and be accountable for particular portions, they are all jointly responsible to the creditors for the proper application of the whole property.[2]

§ 464. *Liability of Sureties on Assignee's Bond.*—The liability of the sureties on the assignee's bond is ordinarily regulated by the statute requiring the giving of the bond. Ordinarily, the sureties on the bond stand in no better position than their principal. The measure of his responsibility is the measure of theirs,[3] and where, by a final decree upon the account of an assignee, he is directed to pay the claims of a specific creditor, his sureties are liable for default of payment, and cannot defend on the ground that they were not bound by the decree.[4]

Where the bond given under the statute was conditioned for the faithful discharge of the duties of the assignee, and for the due accounting for all moneys received by the assignee, it was held in a case in New York that the accounting referred to was an accounting to creditors under the assignment, and that where the assignment had been set aside as fraudulent, and judgment creditors entitled to the funds in the hands of the assignee, were unable to collect them, there was no liability created by the bond in favor of

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[1] Royall's Adm'r v. McKenzie, 25 Ala. 364.

[2] Miller v. Holcombe's Ex'r, 9 Gratt. 665.

[3] Patterson's Appeal, 48 Penn. St. 342. But where the statute provided that when the assignee fails to make payment of the trust fund on demand, he should pay interest at the rate of twenty per cent. per annum, in a suit brought upon the official bond, for breach of condition, it was held that the action sounded in tort, and the measure of damages was the demand and interest at six per cent. State v. Hart, 38 Mo. 44.

[4] Little v. Commonwealth, 48 Penn. St. 337.

such creditors against the sureties.[1] Where the assignee attempts to defend an action on the bond, on the ground that he has faithfully discharged his duties under the assignment, and that creditors had not presented their claims, they must allege and show that they were ready and willing to receive the claims, and that one or more meetings were called for that purpose, of which the creditors had notice.[2]

In a case in Ohio,[3] a creditor was allowed to recover on the assignee's bond the proportionate amount of his claim to the whole amount of those claims which had been presented and allowed pursuant to the statute.

In New Jersey,[4] after the damages, have been assessed against an assignee and his sureties, on their bond, the surety cannot have the amount of a creditor's claim deducted therefrom, on the ground that it was not presented to the assignee under oath, where such claim was allowed and included in all of the assignee's accounts and no creditor objects thereto. He is bound to answer for all the money found due from his principal.

A new trustee cannot, by virtue of his appointment, sue upon the bond of his predecessor for a breach thereof.[5]

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[1] People v. Chalmers, 1 Hun, 683.
[2] Morrill v. Richardson, 9 Pick. 84.
[3] Lahm v. Johnston, 32 Ohio St. 590.
[4] In Re Stelle, 34 N. J. Eq. 199.
[5] Thompson v. Childress, 1 Tenn. Ch. (Cooper), 369.

CHAPTER XLI.

PROCEEDINGS IN CASE OF THE DEATH, REMOVAL, NON-ACCEPTANCE, RESIGNATION, MISCONDUCT, INSOLVENCY, OR INCAPACITY OF AN ASSIGNEE.

§ 465. *In case of Death.*—Where there are several assignees, and one dies, the execution of the trust devolves (in the absence of any special provision to the contrary) upon the survivors.[1] In Connecticut it is provided by statute, that if any trustee of an estate assigned for the benefit of creditors, not being a sole trustee, die, the court of probate, may, in its discretion, unless the assignment shall otherwise provide, appoint another trustee in his stead, who shall be associated with the other trustee or trustees, in the same manner as was the trustee so dying; and if the court shall not so appoint, the other trustee shall complete the execution of the trust.[2] In Pennsylvania it is provided by statute, that in case of the death of one or more of several trustees, the survivors or survivor and remaining trustees shall have and exercise all the title and authority which the whole might have done, unless the trust or power conferred shall require the whole number to act;[3] in which case the vacancies shall be filled by the courts having jurisdiction.[4] In a case in Mississippi, where a corporation assigned all its property to two trustees, to be held by them,

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[1] Stewart v. Pettus, 10 Mo. 755; Shook v. Shook, 19 Barb. 653; Hannah v. Carrington, 18 Ark. 85; see Hill on Trustees, 303, and note. In New York, every estate vested in trustees as such, is held by them in joint tenancy. 3 Rev. Stat. (7th ed.) 2179, § 44; see Belmont v. O'Brien, 12 N. Y. 394; Brennan v. Willson, 71 N. Y. 502; s. c. 4 Abb. N. C. 279. As to the rights of a surviving trustee against the estate of a deceased co-trustee, see Hart v. Bulkley, 2 Edw. Ch. 70.

[2] Gen. Stat. (Rev. 1875), p. 381, § 14.

[3] Act of May 3, 1855, § 2; Laws of 1855, p. 415; Purdon's Dig. (Brightley, 10th ed.) p. 1426, pl. 72.

[4] Id. ibid.; and see the act of June 14, 1836, § 23; Purdon's Dig. (Brightley, 10th ed.) p. 1418, pl. 23.

"and the survivors of them, and the heirs, executors, administrators and assigns of such survivor," in trust for the payment of the debts of the corporation, and after the trust had been accepted by the trustees, one of them died, and the corporation and the surviving trustee (A. J.) executed a new deed, by which they assigned to the surviving trustee and one G. R. all the property embraced in the original deed, to be held by them for the same uses and subject to the same trusts specified in the original deed, which latter trust was accepted by A. J. and G. R.—it was held that the original deed gave the power of assignment to the surviving trustee, and that the title of A. J. and G. R. as trustees was valid in law.[1]

If a sole assignee die before the trust be finally executed, the court having jurisdiction either appoints a new assignee,[2] or selects and empowers some other person to discharge the duties of the trust. The administrator of a deceased assignee is not bound to assume the supervision of the trust property, or to be legally responsible for its administration.[3] In Connecticut, under the statute regulating assignments, if a sole assignee dies, the court of probate appoints another assignee in his stead.[4] In Pennsylvania, the court of common pleas appoints a new assignee, on application of any person interested in the property, and after due notice to all parties concerned.[5]

In Illinois,[6] if any assignee dies before the closing of his trust, it is the duty of the county judge, on application, to appoint some discreet and qualified person to execute the trust, who, on giving bond, succeeds to all the powers and duties of his predecessor.

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[1] Peck v. Ingraham, 28 Miss. 246.

[2] 2 Tuck. Com. [458] 446, p. 44.

[3] Bowman v. Raineteaux, Hoff. Ch. 150; see the New York statute, *post*, pp. 711, 712, 715.

[4] Gen. Stat. (Rev. 1875), p. 363, § 68.

[5] Act of June 14, 1836, §§ 23, 24; Purdon's Dig. (Brightley, 10th ed.) p. 1418, pl. 23, 24.

[6] R. S. (Cothran, 1881), p. 121, § 12.

A similar provision exists in Oregon,[1] Wisconsin,[2] and Texas.[3] In New Jersey, it is provided by the statute regulating assignments, that if the assignee or assignees who have been appointed and have given surety, according to the provisions of the act, should die before the final settlement of the estate, it shall be lawful for the *surety* to proceed to final settlement, and perform every duty which the assignee or assignees could rightfully have performed, having first given additional security for the faithful performance of the trust.[4] And that in case the surety should die, or reasonable objections be made by the creditors against his acting, or he should refuse to act, the orphans' court shall proceed to appoint some suitable person or persons to settle the estate.[5] In Maine, if any assignee dies, resigns, becomes insane, or otherwise unsuitable to perform the trust, refuses or neglects so to do, or mismanages the trust property, the judge of probate for the county, after due notice, shall appoint another in his place, who shall have the same powers and be subject to the same liabilities as the original assignee.[6]

In Rhode Island,[7] the death of the assignee makes a "vacancy in the office," within the meaning of the statute,[8] and a new trustee thereunder can be appointed on petition as well as on bill filed; but this would not be so independent of statute, the proceeding by bill being the proper form.

In New York, it is provided by "An act in relation to trustees of personal estates" that, "upon the death of a surviving trustee of an express trust, the trust estate shall not descend to his next of kin or personal representatives, but the trust, if unexecuted, shall vest in the supreme court, with

[1] Laws of 1878, p. 40, § 14.
[2] R. S. (1878), § 1702.
[3] Act of 1879, c. 53, p. 57; appendix to R. S. (1879), p. 7, § 14.
[4] Rev. Stat. (ed. 1878), p. 39, § 14.
[5] Id. p. 40, § 15.
[6] Rev. Stat. (ed. 1871), p. 545, c. 70, § 7; see p. 32, *ante*.
[7] Petition of Ballou, 11 R. I. 359.
[8] Pub. Stats. (1882), c. 178.

all the powers and duties of the original trustee, and shall be executed by some person appointed for that purpose, under the direction of the court. But no person shall be appointed to execute said trust until the beneficiary thereof shall have been brought into court by such notice and in such manner as the court may direct."[1]

But it is also provided in the general assignment act, that, "In case an assignee shall die during the pendency of any proceeding under this act, or at any time subsequent to the filing of any bond required herein, his personal representative or his successor in office, or both, may be brought in and substituted in such proceeding, on such notice (of not less than eight days) as the county judge may direct to be given; and any decree made thereafter shall bind the parties thus substituted, as well as the property of such deceased assignee, provided, however, that if such assignee die subsequent to the filing of his bond and before any proceedings may have been had thereunder, then the surety on such bond may apply to the county judge for an accounting, who may, on such terms as to him seem just and proper, appoint another assignee and release such surety."[2]

§ 466. *In case of Removal.*—In Pennsylvania, if an assignee is about to remove out of the jurisdiction of the court, he may be proceeded against by citation, as in case of misconduct.[3] And if he shall have removed from the State, or cease to have a known place of residence therein, during the period of a year or more, the court, on due proof thereof, may at once dismiss him.[4] In Alabama, if a trustee leaves the State without executing the trust confided in him, the court of chancery has authority to execute it.[5]

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[1] Laws of 1882, c. 185.

[2] Laws of 1877, c. 466, § 10; 3 R. S. (7th ed.) p. 2278, § 10; see Matter of Grove, 64 Barb. 526.

[3] Act of June 14, 1836, § 11; Purdon's Dig. (Brightley, 10th ed.) p. 1417, § 12.

[4] Act of June 14, 1836, § 20; Purdon's Dig. (Brightley, 10th ed.) p. 1418, § 20; but see act of May 17, 1871, ibid. p. 1426, § 74.

[5] Cullum v. Branch Bank at Mobile, 23 Ala. 797.

§ 467. *In case of Non-acceptance.*—If a sole assignee have been appointed by the assignment, and he decline to act, a new assignee will be appointed by the court having jurisdiction.[1] In Pennsylvania, this power is expressly given by statute to the courts of common pleas, not only in the case where a single assignee renounces the trust, but where one of several renounces, and the duties of the trust require the joint act of all.[2] It is exercised on the application, by bill or petition, of any person interested in the estate or property which is the subject of the trust, and not otherwise, and after due notice to all parties concerned.[3]

In New York, where one of several trustees refuses to accept the trust, it devolves upon the others, and the whole trust estate vests in them; but if all refuse, though the legal estate nominally vests in the trustees, the execution of the trust devolves upon the court, and new trustees may be appointed, if necessary.[4]

In Connecticut, if the trustee or trustees of any estate assigned for the benefit of creditors, shall neglect or refuse to accept the trust, having been notified thereof, it is made the duty of the court of probate to appoint one or more trustees in his or their stead, as the court may think proper.[5] And if one of several trustees refuse to accept the trust, the court may, in its discretion, appoint another in his stead; and if the court shall not so appoint, the other trustees shall complete the execution of the trust.[6]

So in Iowa, where the assignee fails, within twenty days after the making of the assignment, to file an inventory and give bonds, the court will appoint another trustee to execute the trust.[7]

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[1] Barcroft v. Snodgrass, 1 Cold. (Tenn.) 430; Furman v. Fisher, 4 Cold. (Tenn.) 626. Where a deed of trust is made to several trustees, and a part disclaim, the others will take both the legal estate and the power to administer the trust, unless the intention that all shall act is expressly or clearly implied from the conveyance. Ratcliffe v. Sangston, 18 Md. 383.

[2] Act of June 14, 1836, § 23; Purdon's Dig. (Brightley, 10th ed.) p. 1418; Johnson v. Harvey, 46 Penn. St. 415.

[3] Act of June 14, 1836, § 24; Purdon's Dig. (Brightley, 10th ed.) p. 1418, § 14.

[4] King v. Donnelly, 5 Paige, 46.

[5] Gen. Stat. (Rev. 1875), p. 381, § 14.

[6] Id. ibid. § 13.

[7] Iowa Code (1880), p. 572, § 2128.

In Tennessee, an appointment by the county court of a new trustee, where the original one in open court refuses to act, made upon the application of the principal beneficiary in a deed of trust for creditors, is good without notice to the assignor, although the deed provides that the surplus proceeds, after satisfying the purposes of the trust, shall be paid to the maker.[1]

§ 468. *In case of Resignation.*—After a trustee has once accepted the trust, he cannot discharge himself from liability by a resignation merely.[2] He must either be discharged from the trust by virtue of a special provision in the deed which created it, or by the direction of a court of competent jurisdiction,[3] or with the general consent of all the persons interested in the execution of the trust.[4]

In New York it is generally provided by statute that, upon the petition of any trustee, the court of chancery (supreme court) may accept his resignation and discharge him from the trust, under such regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the persons interested in the execution of the trust may require.[5] Full power is given to the chancellor to appoint a new trustee in place of a trustee resigned or removed; and where, in consequence of such resignation or removal, there shall be no acting trustee, the court, in its discretion, may appoint new trustees, or cause the trust to be executed by one of its officers under its direction.[6]

[1] Edmonson v. Harris, 2 Tenn. Ch. (Cooper), 427; see Thompson v. Childress, 1 Id. 39; Hobart v. Andrews, 21 Pick. 526; Houghton v. Davis, 23 Me. 28.

[2] Bethune v. Dougherty, 30 Ga. 770; see Perry on Trusts, § 267.

[3] McCullough v. Sommerville, 8 Leigh (Va.), 415; Alpaugh v. Roberson, 27 N. J. Eq. 96.

In New York the resignation must be made to the supreme court. Its acceptance and the discharge of the assignee and the appointment of his successor are matters for the action of that court. Keiley v. Dusenberry, 42 N. Y. Superior Ct. 238; affid 77 N. Y. 597; Thatcher v. Candee, 3 Abb. Dec. 387; s. c. 3 Keyes, 157, 160; Leggett v. Hunter, 19 N. Y. 459; Cruger v. Halliday, 11 Paige, 819.

[4] Shepherd v. McEvers, 4 Johns. Ch. 136; Cruger v. Halliday, 11 Paige, 314; Jones v. Stockett, 2 Bland, 409; Breedlove v. Stump, 3 Yerg. 257: see Read v. Robinson, 6 W. & S. 329; Hill on Trustees (3d Am. ed.), [554] 330.

[5] 1 Rev. Stat. 730, § 69; 3 R. S. (7th ed.) p. 2183, § 69.

[6] Id. ibid. § 71. This section and § 69 extend only to cases of express trusts. Id. 72.

But a trustee, on being discharged for no other cause than his own wish to be relieved from the duties of the trust, must pay the cost of the petition and of the appointment of his successor, and resign all claim to commissions on the capital of the estate.[1]

In Pennsylvania an assignee may obtain his discharge from the trust by application to the proper court of common pleas; but the discharge will not be allowed unless the assignee's account shall have been duly settled or confirmed, so far as he shall have acted in the trust,[2] nor unless notice of such application shall have been given to all parties interested, either personally or by advertisement, nor until such assignee shall have surrendered the trust estate remaining in his hands to some other assignee or other person appointed by the court to receive the same, and have performed all such other matters as may be required in equity.[3]

In the same State, if a sole assignee, after formally accepting the trust, refuses to execute it, it is competent to any of the parties interested in it to call upon the proper court to appoint another.[4]

In Missouri, when any assignee becomes satisfied that it is no longer advantageous to the creditors to keep the assignment open, he may apply to the circuit court in whose clerk's office the inventory is filed, for a discharge from his trust.[5] The application is by petition filed in the court, and preceded by notice of his intention to make such application, stating the time, which notice must be published for at least six weeks next preceding. The petition must be verified by affidavit, and set forth the disposition made of the assets of the assignment to him; what portion of them

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[1] Matter of Jones, 4 Sandf. Ch. 27.

[2] See Fournier v. Ingraham, 7 W. & S. 27.

[3] Act of June 14, 1836 § 22; Purdon's Dig. (Brightley, 10th ed.) p. 1418, § 22; see also Stat. of Kans. (ed. 1868), c. 6, § 39.

[4] Seal v. Duffy, 4 Barr, 274; Bell, J., Id. 278. For the rule in Alabama, see Drane v. Gunter, 19 Ala. 731.

[5] Stat. of Mo. (Wagner, 1872), p. 157, §§ 38, 39; R. S. (1879), §§ 390, 391; see also the two following sections of the statute.

remains on hand, and their condition; the amount realized from the assets; the particular disposition of such amount; the demands allowed, particularly, with their respective amounts and owners' names, and the sums paid on each; with an offer to deliver into the charge of the court what remains of the assets, and the evidences thereof, accompanied with all vouchers therewith connected. If no person interested shall within one week after the filing of the petition, file written objections to such discharge, accompanied by specified reasons, the court refers the application to the commissioner of the court, or one appointed for the case, to examine the merits of the application and report thereon; and upon the filing of such report in such court, the court shall make such further order in the premises as it shall adjudge right, and may discharge the assignee from all further duty or obligation under the assignment.

§ 469. *In case of Misconduct.*—If an assignee misconducts himself in his office, by wasting, neglecting or mismanaging the estate, or refusing or neglecting to comply with some requirement of law, as to file an inventory, or give bond, or to account, proceedings may be taken to dismiss or remove him.[1] In Connecticut it is provided by statute,

[1] See 2 Story's Eq. Jur. § 1287. A court of equity has power to remove a trustee, and will do so, when the safety of the fund and the due execution of the trust shall require it. Geisse v. Beall, 8 Wis. 367; Mandell v. Peay, 20 Ark. 325; Pinneo v. Hart, 30 Mo. 561; Hatcher v. Winters, 71 Id. 30; see Perry on Trusts, §§ 817, 818. Where a trustee refuses and neglects to account, upon proper and reasonable application, or neglects or refuses to execute the trust in a proper and legal manner, or converts the trust estate to his own use, or otherwise becomes unfaithful to the duties and obligations which he has assumed as such trustee, a court of equity will remove him, and provide other agencies for the due execution of the trust. Geisse v. Beall, 8 Wis. 367.

Where the assignee refused the creditors access to the books of the debtor, and there were other suspicious transactions between the assignor and assignee, it was held that there was ground for the appointment of a receiver, on an application for the removal of the assignee. Manning v. Stern, 1 Abb. N. C. 409. The examination of witnesses and the production of books may be ordered, though no other proceeding under the act is pending. Matter of Bryce, 56 How. Pr. 359.

In the New York statute (3 R. S. [7th ed.] p. 2280, § 21) provision is made for the examination of witnesses and books. See Matter of Isidor, 59 How. Pr. 98; Matter of Burnett, 8 Daly, 363.

The assignor may be examined. Matter of Koonz, 11 N. Y. Weekly Dig. 55; Matter of Strauss, 1 Abb. N. C. 402.

that the court of probate may, in any case, on the complaint of any person interested in the trust, remove any trustee of an estate assigned for the benefit of creditors, due notice of such complaint having been given him, and sufficient cause having been shown for his removal.[1] In New York, it is provided generally, that upon the petition or bill of any person interested in the execution of a trust, and under such regulations as shall for that purpose be provided, the court of chancery (supreme court) may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who for any other cause shall be deemed an unsuitable person to execute the trust,[2] and the court is empowered to appoint a new trustee in his place, as in cases of resignation.[3]

The general assignment act (§ 3) in New York[4] also provides for the removal of the assignee in case of failure to file an inventory or schedule. We have already given that section under another head.[5]

The statute further provides, that "The county judge shall, in a case provided in section three, and may also at any time, on the petition of one or more creditors showing misconduct or incompetency of the assignee, or on petition of the assignee himself showing sufficient reason therefor, and after due notice of not less than five days to the assignor, assignee, surety, and such other person as such judge may prescribe, remove or discharge the assignee and appoint one or more in his place, and order an accounting of the assignee so removed or discharged; and may enjoin such assignee from interfering with the assignor's estate, and make provision by

[1] Gen. Stat. (Rev. of 1875), p. 392, § 26.

[2] 1 Rev. Stat. 730, § 70; 3 R. S. (7th ed.), p. 2183, § 70.

[3] Id. ibid. § 71; see Planck v. Schermerhorn, 3 Barb. Ch. 644, 646. In the case of The People v. Norton (9 N. Y. 176), it was held by the court of appeals (Ruggles, Ch. J.), that the court of chancery of this State had the power, by its general authority, independent of any statute, to displace a trustee on good cause shown, and to substitute another in his stead.

[4] Laws of 1877, c. 466; Laws of 1878, c. 318; 3 R. S. (7th ed.) p. 2276.

[5] See § 381, *ante*.

order for the safe custody of the same, and enforce obedience to such injunction and orders by attachment; and upon his discharge upon his own application, such assignee's bond shall be canceled and discharged. The new assignee shall give a bond to be approved as above required."[1]

In New Jersey, it is provided by the statute of assignments, that on its appearing upon examination that any assignee has embezzled, wasted, or misapplied the estate assigned to him, the orphans' court of the county in which the assignor resided at the time of the assignment shall proceed to remove said assignee, and appoint some suitable person or persons in his stead, to fulfil the trusts contained in the deed of assignment. The assignee so appointed is required to give bond with security, and is thereupon declared to have all the power and authority of the former assignee, and to be subject to the same duties and liabilities.[2]

In Pennsylvania, it is provided that whenever it shall be made to appear in a court of common pleas, having jurisdiction, that an assignee or trustee has neglected or refused, when required by law, to file a true and complete inventory, or to give bond with surety, or to file the accounts of his trust, or that an assignee or trustee is wasting, neglecting, or mismanaging the trust estate, it shall be lawful for such court to cite him to appear before it at a time named, to show cause why he should not be dismissed from his trust; and on the return of the citation, the court may require security or further security from such assignee, or may proceed at once to dismiss him from the trust.[3]

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[1] 3 R. S. (7th ed.) p. 2278, § 6.

The words "misconduct" or "incompetency" were intended to embrace all the reasons for which an assignee ought to be removed, and the power of removal conferred is equal to that possessed by a court of equity. Matter of Cohn, 78 N. Y. 248. As to the practice on removal under the act, see Matter of Horsfall, 5 Abb. N. C. 289; s. c. 8 Daly, 190; affi'd 77 N. Y. 514; Robinson's Case, 37 N. Y. 261; Matter of Miller, 15 Abb. Pr. 277.

[2] Rev. Stat. (ed. 1878), p. 40, § 16.

[3] Act of June 14, 1836, §§ 11, 12; Purdon's Dig. (Brightley, 10th ed.) p. 1417, pl. 12, 13. The court of common pleas has power to dismiss a trustee at any time, even before he has entered upon his duties, upon good cause being shown

In Missouri,[1] it is provided that where an assignee neglects to file an inventory or give bond, as required by statute, he may be cited to show cause why he should not be dismissed. And on the return of the citation the court may require him to file an inventory or give bond, in such time as it may deem reasonable, or it may proceed at once to dismiss him from his trust. When an assignee is dismissed, the court may appoint a new one, who is required to give like bond and security, and to whom the court is required to order the books, papers, and property to be forthwith delivered.

In Ohio,[2] and Kansas,[3] the creditors are empowered to select an assignee, who succeeds to the rights and liabilities of the assignee named in the assignment. In the former State, the probate judge may remove any assignee for good cause and appoint a successor, and enforce the transfer of the trust, and may also discharge the sureties upon the assignee's bond.[4]

In Indiana, the act regulating assignments provides for the removal of the assignee upon petition, and for the filling of a vacancy occasioned by the death, resignation or removal of the assignee.[5] The act also provides for the discharge of the trustee from his liability under the trust. In Iowa likewise, special provision is made by statute for the appointment of an assignee to supply the place of an assignee who has died, or who has failed to comply with the require-

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by the *cestui que trust*. Piper's Appeal, 20 Penn. St. 67. An assignee who has been discharged for malfeasance, and has not settled his account in the proper court, and satisfied the court that there was a balance due him from the assigned estate, has no legal or equitable claim which he can enforce against the assigned estate in the hands of the subsequently appointed assignee. Fournier v. Ingraham, 7 W. & S. 27.

[1] Stat. of Mo. (Wagner, 1872), p. 155, §§ 29–32; R. S. (1879), §§ 381–384.

[2] Act of March 16, 1874; Sayler's Stat. vol. 4, p. 3202, c. 2739; R. S. (1880), § 6338. For maladministration, the assignee is subject to removal, and if he colludes with the assignor against the creditors he certainly should be removed. Thomas v. Talmadge, 16 Ohio St. 433.

[3] Laws of 1876, c. 101; Comp. L. (1881), p. 103.

[4] Act of April 16, 1874; Sayler's Stat. vol. 4, p. 3250, c. 2784; R. S. (1880), § 6339.

[5] Gen. Stat. of Ind. (G. & H.) p. 117, § 19; R. S. (1881), § 2680.

ments of the act relating to the filing of the inventory and bond.[1]

In Rhode Island the supreme court may, upon the petition of a majority in interest of the creditors interested in any such deed of assignment, upon due notice and for cause shown, remove the assignee or assignees named therein from their office and trust.[2] The court is also empowered to name a new assignee or assignees, who shall be substituted in the place of the retiring assignee.[3]

Provision is made for the settlement of the accounts of the assignee removed,[4] and also for the discharge of the substituted assignee.[5]

In Wisconsin[6] the circuit judge may, upon notice, remove any assignee who is shown to be incompetent or to have become disqualified, or to have wasted or misapplied any of the trust estate, and compel, by order, a settlement of his account and surrender of the estate to his successor; and in place of any assignee who shall be removed, may appoint another, who shall give like bond and be subject to like duties and responsibilities as to the estate remaining undisposed of, and proceedings remaining to be taken, as if appointed by the instrument of assignment.

Similar provisions have been made by statute in Oregon,[7] Illinois,[8] Minnesota[9] and Texas.[10]

§ 470. *In case of Insolvency.*—In New York, if an assignee becomes insolvent, or is insolvent at the time of the assignment, a receiver will be appointed by the court having juris-

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[1] Iowa Code (1880), p. 572, § 2128.

[2] Pub. Stats. of R. I. p. 657, § 3.

[3] Ibid. § 4.

[4] Ibid. § 6.

[5] Ibid. § 7. No action abates by the removal of the assignee. Ibid. § 5. Under the statute, the application must be made by a majority in interest of the creditors interested in the assignment; the remedy, in case such majority do not apply, being by bill only. In the Matter of Durfee, 4 R. I. 401.

[6] R. S. (1878), § 1702.

[7] Laws of Oregon (1878), p. 40, § 14.

[8] R. S. (1881, Cothran), p. 121, § 12.

[9] Stats. of Minn. (1878), p. 546, § 29.

[10] Acts of 1879, c. 53, p. 57; appendix to R. S. (1879), p. 7, § 14. A subsequent section (§ 16) provides for the discharge of the assignee.

diction.[1] In Pennsylvania the proceeding is by citation, as in cases of misconduct.[2] And the like proceedings are had where the surety of the assignee is in failing circumstances, or has removed out of the State, or signified his intention to do so.[3] A similar provision has been enacted in Missouri.[4] In New Jersey, whenever the security given by any assignee under the act regulating assignments shall be insufficient at the time of giving it, or shall afterwards become insufficient, it is made the duty of the orphans' court of the county in which the assignor resided at the time of making the assignment, to order and direct such assignee to give such further or other security to the ordinary, by bond in the usual form, as to the said court, after hearing the objections of creditors or persons concerned, shall seem proper; and if the assignee neglect or refuse to give such additional security as may be ordered, the court shall proceed to remove him and appoint another in his stead.[5]

And in Iowa, it is provided that where the security is discovered to be insufficient, or it appears the assignee is guilty of wasting or misapplying the trust estate, the court may require additional security, and may remove such assignee, and may appoint others instead.[6]

§ 471. *In case of Incapacity.*—If an assignee becomes incompetent to perform the duties of his office from lunacy,[7] habitual drunkenness,[8] or other cause, he may be removed and a new assignee appointed, as in other cases.

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[1] Keyes v. Brush, 2 Paige, 311; Reed v. Emery, 8 Id. 417; Connah v. Sedgwick. 1 Barb. S. C. 210. These decisions were previous to the act of 1860, which required the execution of a bond on the part of the assignee. It seems that, in case of a failure to give the bond, the court will compel the giving of a bond or the surrender of the property to an assignee in bankruptcy where such assignee has been appointed. Von Hein v. Elkus, 8 Hun, 516; see the present statute, 3 R. S. (7th ed.) p. 2276.

[2] Act of June 14, 1836, §§ 11, 12; Purdon's Dig. (Brightley, 10th ed.) p. 1417, pl. 12, 13.

[3] Penn. Act of 1836, § 20; Purdon's Dig. (Brightley, 10th ed.) p. 1418, pl. 20.

[4] Stats. of Mo. (Wagner, 1872), p. 155, § 31; R. S. (1879), § 383.

[5] Rev. Stat. (ed. 1878), p. 40, § 16. [6] Iowa Code (1880), p. 572, § 2128.

[7] Penn. Act of 1836, § 20; Purdon's Dig. (Brightley, 10th ed.) p. 1418, pl. 20.

[8] Penn. Act of June 14, 1836, § 20; see Bayles v. Staats, 1 Hals. Ch. 513. On a trustee's becoming incapable of executing a trust, a court of equity will carry

In Massachusetts it was provided, by the statute of 1836, c. 238, § 7, that the supreme court or court of common pleas might, upon the application of the debtor, or of the assignees, or of any creditor or other person interested in the case, remove any assignee for any sufficient cause, and upon such removal, or upon the death or resignation of an assignee, appoint another in his place. In Rhode Island it is provided that an assignee may be removed by the supreme court on the application of a majority in interest of the creditors, on cause shown, and a new assignee appointed.[1]

§ 472. *Powers of new Assignee.*—Where an assignee has been appointed or substituted by the court in the place of another, as described in the present chapter, he succeeds to all the rights, powers and duties of his predecessor. In Pennsylvania it has been expressly provided by statute, that every assignee and trustee appointed by the court shall be liable to the same duties, shall have the same powers and authorities in relation to the trust, or to the further execution of the same, as the case may be, and shall be subject to the jurisdiction and control of the court in the same manner, to all intents and purposes, as his predecessor or predecessors in the trust.[2] And that upon the appointment by the court of such assignee or trustee, and upon his giving security, if he shall be so required, all the trust estate and effects whatsoever shall, forthwith, and without any act or deed, pass to and be vested in such succeeding assignee or trustee.[3] And similar provisions are found in the statutes of other States.[4]

If a debtor makes an assignment of his property in trust

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it into execution in behalf of the parties interested. Suarez v. Pumpelly, 2 Sandf. Ch. 386.

[1] Pub. Stat. (1882), pp. 657, 658.

[2] Act of June 14, 1836, § 25; Purdon's Dig. p. 805, pl. 25.

[3] Id. § 26; Purdon's Dig. pl. 26.

[4] Ohio, Act of April 16, 1874; Sayler's Stats. vol. 4, p. 3250, c. 2784; R. S. (1880), § 6340; Iowa, Code (1880), p. 512, § 2128; Indiana, Stat. of Ind. (G. & H. 1870), p. 117, § 19; R. S. (1881), § 1680; Rhode Island, Pub. Stats. (1882), p. 658.

to pay creditors *pro rata*, one to whom the trustee assigns the property, with notice of the trust, must execute it.[1]

§ 473. *Discharge of Assignee.*—As we have already seen, provision is in some instances made by statute for the discharge of the assignee from his trust. Where no such statutory provisions exist, the assignee will be discharged from the duties and liabilities of his office in the same manner as other trustees are relieved of their trusts.[2] "The discharge of a trustee upon the termination of the trust, or upon the appointment of another trustee, does not of itself release the trustee from responsibility for his past conduct, and the *cestui que trust* may still inquire into his administration prior to his discharge, and may require him to account for all his transactions; therefore it is usual, upon the final settlement and transfer of the trust property to the parties entitled, to discharge the trustee by a formal release of all claims, executed by all the *cestuis que trust* who are *sui juris*."[3]

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[1] Sharp v. Goodwin, 51 Cal. 219.
[2] Perry on Trusts, § 921.
[3] Ibid. § 922.

CHAPTER XLII.

PROCEEDINGS OF CREDITORS.—COMING IN UNDER THE ASSIGNMENT.

§ 474. A voluntary assignment being in its nature a mode and instrument of provision for *creditors*, and deriving its validity from the sufficiency or legality of such provision, the *rights of creditors* obviously form an essential element in any adequate view which can be taken of the law regulating this description of transfer, and of the practice established thereupon. These rights of creditors have already been alluded to, in the progress of this work, as the subject suggested. It has been found most convenient, however, to consider fully, first, how the trust for creditors is created on the part of the *assignor*, and secondly, how it is executed on the part of the *assignee*, before finally showing, under a distinct head, as it is now proposed to do, what are the rights of *creditors*, either under the assignment, or in opposition to it, or independently of it, and what proceedings it is competent for them to adopt for the enforcement of such rights.

§ 475. *Coming in under the Assignment.*—On receiving notice of the execution of an assignment, or becoming otherwise informed that such a transfer has been made, the creditors either accept of the provision made by it, or reject it as fraudulent or illegal, with the view of taking active measures to avoid it; or, in some cases, disregard it entirely, and proceed as though it had not been made.[1] If they accept the assignment, they come in under it, and proceed to take such steps for obtaining its benefits as may be required of

[1] It is optional with the creditors to treat the assignment as void, and disregard the claims of the trustee or assignee, or to hold him to an accountability for the trusts which he has voluntarily assumed. Geisse v. Beall, 3 Wis. 367.

them either by the provisions of the instrument, or by the general rules of law applicable to the case.

An executor holding a bond and mortgage of an assignor whose estate pays a dividend, has been held guilty of *laches* in not presenting his claim on the bond to the assignee.[1]

§ 476. *What Creditors may come in.*—Creditors are entitled to avail themselves of the benefit of an assignment, although it has been made without their knowledge or privity, and may compel the trustee to execute the trusts created by it.[2] And they may come in if they choose, even under a fraudulent assignment.[3] And even where they have already taken legal proceedings against the property of the debtor, which have proved unavailing, or where they have abandoned such proceedings, they may still claim under the assignment; and they are not precluded, in such cases, from receiving a dividend, nor from calling the assignee to account. The doctrine of election does not apply to such cases.[4] But a creditor cannot hold an assignment good in part and bad in part; if he ratifies it at all, he must stand by it.[5]

A married woman may prove her claim against the assigned estate of her husband, like any other creditor, it appearing that her claim was *bona fide* and upon good consideration.[6]

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[1] Wilson v. Staats, 33 N. J. Eq. 524.

[2] Ward v. Lewis, 4 Pick. 518; New England Bank v. Lewis, 8 Id. 113; Pingree v. Comstock, 18 Id. 46; Wilde, J., Id. 50, 51; Shepherd v. McEvers, 4 Johns. Ch. 136; Ingram v. Kirkpatrick, 6 Ired. Eq. 452; Robertson v. Sublett, 6 Humph. 316.

[3] Ames v. Blunt, 5 Paige, 13; Mills v. Argall, 6 Id. 577; Geisse v. Beall, 8 Wis. 367.

[4] Jewett v. Woodward, 1 Edw. Ch. 105.

Where there was an agreement between a debtor and some of his creditors, whereby they were to forego the benefits of an assignment, it was held that if such agreement was valid, and he had so violated it as to absolve the other parties from their obligation, they could claim under the assignment, with the other creditors, and there would be no occasion for an equitable proceeding to vacate the agreement. Hatcher v. Winters, 71 Mo. 30; see Empey v. Sherwood, 12 Nev. 355.

[5] Geisse v. Beall, *ubi supra;* Jefferie's Appeal, 33 Penn. St. 39; Frierson v. Branch, 30 Ark. 453.

[6] Ziegler's Appeal, 34 Penn. St. 342.

An assignee, under the assignment act of South Carolina, by purchasing claims of creditors of the assigned estate, becomes entitled to the rights of such creditors against the agent.[1]

§ 477. *When to come in.*—Where a specific time is prescribed by the assignment for creditors to come in and assent to it, as parties or otherwise, and they have had due notice of it, they must comply strictly with the condition, and cannot come in after the expiration of the time limited.[2] It has been held, however, that they are not, in such case, absolutely excluded; but they can only claim the benefit of any surplus which may remain after satisfying the claims of those creditors who have complied with the terms of the assignment.[3] In some States this is expressly provided by statute. Thus, in New Jersey, if any creditor shall not exhibit his claim within three months from the date of the assignment, he will be barred of a dividend, unless the estate prove sufficient, after the debts exhibited and allowed are fully satisfied, or unless he shall find some other estate not accounted for by the assignee before distribution, in which case he will be entitled to a ratable proportion therefrom.[4] In Massachusetts it was provided, by the statute of 1836, c. 238, § 4, that all creditors should have a right to become parties to the assignment, provided they applied therefor before the final dividend was declared; but no creditor, coming in after any dividend was declared, should be allowed to disturb it, but he should receive an equal portion with the other creditors, so far as the funds then remaining unappropriated in the hands of the assignees should be sufficient. And in Maine, creditors not becoming parties

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[1] McIntyre v. McClenaghan, 12 S. Ca. 185.

[2] Phœnix Bank v. Sullivan, 9 Pick. 410; Battles v. Fobes, 21 Id. 239; Dedham Bank v. Richards, 2 Metc. 105.

[3] De Caters v. Le Ray de Chaumont, 2 Paige, 490, 493.

[4] Rev. Stat. (ed. 1878), p. 40, § 20; see Vanderveer v. Conover, 16 N. J. L. 487. The posting of a claim on the last day for presentation is not a "presenting" or "exhibiting" within the meaning of the statute, where it does not, in fact, reach the assignee on that day. Ellison v. Lindsley, 33 N. J. Eq. 258.

to the assignment, may, after the lapse of eighteen months or two years, trustee the assignee for any excess of the estate, after payment of the debts of the parties thereto and lawful expenses.[1] A release may also be inserted in the assignment, which shall forever discharge the assignor from the claims of such creditors as become parties thereto. Three months are allowed for creditors to become parties.[2] In New Hampshire, creditors are presumed to assent to an assignment unless their dissent is made known to the assignee within thirty days after public notice given of the assignment; and the actions of assenting creditors are discontinued, and their costs form part of their claim against the estate of the debtor, while those dissenting take no benefit under the assignment.[3]

In Ohio,[4] creditors are required to present their claims to the assignee within six months after the publication of notice of his appointment. It has been decided that this provision does not bar the right of a creditor to present his claim and have it allowed after that period has elapsed, at any time before the settlement of the trust. He is entitled to his equitable share of the assets unadministered or not lawfully disposed of at the time when he presents his claim.[5]

In New York the county judge may, upon the petition of the assignee, authorize him to advertise for claims;[6] and it seems that the assignee will not be discharged until he advertises.[7]

Where creditors were unable to comply with the terms of an assignment, by coming in and accepting the benefit of it within a time prescribed, in consequence of want of notice, mistake, or accident, it was held, in New York, that

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[1] Rev. Stat. (ed. 1871), p. 548, c. 70, § 2; see *ante*, p. 32. [2] Ibid. § 4.

[3] Gen. Laws (ed. 1878), p. 386, c. 40, § 3; see *ante*, p. 411, note 1.

[4] R. S. (1880), § 6352.

[5] Owens v. Ramsdell, 33 Ohio St. 439; Lahm v. Johnston, 32 Id. 590; see Dye v. Dye, 21 Id. 86; Haskins v. Alcott, 13 Id. 210.

[6] Laws of 1877, c. 466, § 4; 3 R. S. (7th ed.) p. 2277, § 4.

[7] Matter of Groencke, 5 Abb. N. C. 298; see Ludington's Petition, Id. 307.

they might come in afterwards; and some of the creditors being in Europe, six months was allowed for that purpose.[1]

§ 478. *How to come in.*—Creditors may express their intention to come in under the assignment, in several ways: as by becoming parties to the instrument; by giving notice to the assignee of their acceptance of it; and, less formally, by simply presenting their claims for payment or dividend.

Where the creditors are named in the assignment as *parties*, and they are required to execute it before they can take under its provisions, they must signify their assent in that mode, otherwise they cannot take under the instrument.[2] But where they are not required to be parties to the instrument, they may take the benefit of the trust by *notice* to the trustee within the time prescribed therefor, if any, and if none is prescribed, then within a reasonable time, and before a distribution is made of the property.[3] And in any case where creditors choose to come in under an assignment, and claim the benefit of its provisions, they must comply with such terms or conditions as the debtor has thought proper to impose.[4]

§ 479. *Consequence of coming in.*—By coming in under a voluntary assignment, the creditors express their election to accept of its provisions, and are considered as acquiescing in the disposition directed by the assignor to be made of the proceeds of the property. Thus, where some of the debts directed by the assignor to be paid are usurious, other

[1] De Caters v. Le Ray de Chaumont, 2 Paige, 490, 493; see Raworth v. Parker, 2 K. & J. 163.

[2] Garrard v. Lord Lauderdale, 3 Sim. 1. Where the assignment provided for the distribution of the property among such creditors as should execute it before a certain day, it was held that when the parties assumed to act under the instrument, although it was not actually executed by the creditors, the creditors might maintain an action after the expiration of fifteen years, to have the trusts enforced. Nicholson v. Tutin, 2 K. & J. 18; and see Broadbent v. Thornton, 4 De G. & S. 65; Lancaster v. Elce, 31 Beav. 325.

[3] Halsey v. Whitney, 4 Mason, 206, 214, 225; Acton v. Woodgate, 2 Myl. & K. 492; 2 Story's Eq. Jur. § 1036 a.

[4] Jewett v. Woodward, 1 Edw. Ch. 195, 197; Sandford, J., in Litchfield v. White, 3 Sandf. S. C. 545, 553; see Wallace v. Cumming, 27 La. Ann. 631.

creditors claiming under the assignment cannot, on that ground, object to their allowance. "In the case of a voluntary assignment," observes Chancellor Walworth, "where the assignor creates his own trusts, a creditor who comes in to claim a share of the fund under it, must be contented to take such share of it as the assignor intended to give him, and cannot claim that which was intended to be given to the assignees in trust for others. A creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment on the ground that they are illegal and a fraud upon the honest creditors of the assignor, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself, as a preferred creditor or otherwise."[1]

In a case in Tennessee,[2] it was held that a beneficiary under a trust assignment for creditors, who is a party to a suit for the execution of the trust, consenting thereto and accepting its benefits, cannot acquire a title to any of the property under a tax sale free from the trust.

Another consequence of coming in under an assignment, in certain cases, is that the creditor elects to take the provision made for him by the debtor in full discharge of his

[1] Pratt v. Adams, 7 Paige, 615; see Green v. Morse, 4 Barb. S. C. 332, 342; Jewett v. Woodward, 1 Edw. Ch. 195; Olmstead v. Herrick, 1 E. D. Smith, 310; Frierson v. Branch, 30 Ark. 458. In the case of Johnson v. Rogers (15 N. B. R. 1), in the District Court of the United States for the Northern District of New York, where it appeared that the assignors called their creditors together and explained their financial situation, and after consultation, and with the advice and concurrence of many of the creditors, it was concluded that a general assignment, without preferences, should be made to three assignees, two of whom were to be selected by the creditors, and one by the assignor, and subsequently various creditors became dissatisfied, and actions were commenced and judgments recovered against the assignors—it was held that, having concurred in the execution of the assignment, they could not be heard to allege that it was fraudulent because of facts of which they were fully informed when they gave their assent. And a transferee of a claim from one of the creditors, where the transfer is colorable merely, will stand in no better position than the transferrer. But it seems that if the transfer were for a valuable consideration, the purchaser might prevail upon a title upon which the vendor could not. A creditor is not estopped from assailing an assignment by merely treating with the assignee as such under the assignment, nor where he has accepted the instrument in ignorance of the fraud.

[2] Harrison v. Winston, 2 Tenn. Ch. (Cooper), 544.

demands. This consequence, however, arises only in virtue of some express stipulation contained in the assignment to which the creditor has become a party (such as the stipulation for a release, which has been already considered), or some positive statutory provision. Thus, in New Jersey, creditors coming in under an assignment and exhibiting their demands for a dividend are declared to be wholly barred from having afterwards any action or suit at law or equity against the debtor or his representatives, except in cases of fraud or concealment of property by the debtor.[1] In construing this section it was held, that the legislature plainly intended that if a debtor makes a fair surrender of his property, every creditor who voluntarily presents his claim and comes in for a dividend shall be precluded from ever after suing for his debt or any part of it. As to such creditor the debtor is forever discharged from his debt.[2]

In Maryland a creditor who claims a share in the proceeds of sale under a deed of trust, makes himself so far a party to such deed as to lose his right to deny its validity.[3]

In a case in Nebraska,[4] the defendant made an assignment in Illinois under the statute of that State. The deed conveyed lands in Nebraska, which the plaintiffs attached, and presented their claims as creditors in Illinois. It was held that they were not deprived thereby of their right of action in Nebraska, there being nothing in the statute or in the assignment preventing such action.

§ 480. *Proof of Debts.*—Where proof of the debts is positively required by the assignment, or by any judicial order obtained under it, or by any statute regulating the proceedings, the making of such proof in the form required is, of course, a necessary preliminary to obtaining any payment

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[1] Rev. Stat. (ed. 1878), p. 40, § 21.

[2] Vanderveer v. Conover, 16 N. J. L. 487, 490; see Coffee v. Pleasants, 8 Am. L. Rec. 312.

[3] Lanahan v. Latrobe, 7 Md. 268. And see further, under the head of "Effect of taking Dividend," *infra*, in the text.

[4] Gross v. Bunn, 10 Neb. 217.

or dividend from the assignee. In the absence of any such express provision or direction, and where the debts to be paid are designated in the assignment or schedule, less strictness is required, though even in these cases assignees are entitled to be satisfied of the identity and amount of the claims presented to them, and to call for the production of any evidence of debt which the creditors may possess.[1]

§ 481. *Application of Dividend.*—Where, under an assignment for the benefit of such creditors as become parties to it, and thereby release their claims, a dividend is received by one of such creditors, it must be applied ratably to all his claims against the debtor, as well as those upon which other parties are liable, or which are otherwise secured, as to those which are not so secured.[2]

§ 482. *Effect of taking Dividend.*—An assignment which is voidable, as tending to delay creditors, cannot be questioned by a creditor who has taken a dividend under it.[3] But trustees appointed under insolvent laws, being creditors of the insolvent, do not, by receiving dividends under a prior voluntary assignment made by the debtor for the benefit of creditors, thereby affirm the voluntary deed, but they may afterwards avoid it if otherwise voidable.[4] In Maine, it was at one time held,[5] that a creditor who had become a party to an assignment containing a release, and received dividends under it, could not be permitted to object to its validity. But this was afterwards overruled,[6] it having

[1] See Lancaster v. Elce, 31 Beav. 825. Under the Missouri statute, the circuit court has no power to compel the assignee to prove his demand. It seems that the proper remedy for the creditor is the writ of mandamus. January v. Powell, 29 Mo. 241.

[2] Commercial Bank v. Cunningham, 24 Pick. 270.

[3] Adlum v. Yard, 1 Rawle, 163; Daub v. Barnes, 1 Md. Ch. 127; Scott v. Edes, 3 Minn. 377; Moule v. Buchanan, 11 G. & J. 314; Frierson v. Branch, 30 Ark. 453; Wallace v. Cumming, 27 La. Ann. 631; see *ante*, p. 653, note 2; and see *post*, p. 747. But it seems, where the creditor has accepted a dividend under an assignment in ignorance of the fraudulent character of the assignment, he may disaffirm the act on the discovery of the fraud by tendering back what he has received. Babcock v. Dill, 43 Barb. 583.

[4] Weber v. Samuel, 7 Barr, 499.

[5] Fisk v. Carr, 20 Me. 301.

[6] Vose v. Holcomb, 31 Me. 407.

been deccided[1] that an assignment containing such a release was illegal. More recently, however, assignments with releases have been declared legal by statute.[2] In Vermont the mere acceptance by a creditor of a payment from the assignee, without becoming a party to the deed of assignment, will not prevent him from sustaining an action at any time upon his claim against the debtor.[3] In Alabama a creditor who receives his *pro rata* share of the proceeds of sale under a deed of trust, is not thereby estopped from attacking the deed for fraud.[4] In South Carolina an acceptance of a provision under a deed of assignment, and a release of the principal debtor, with the assent of the surety, is equivalent to a discharge by operation of law.[5]

§ 483. *Rights of Preferred Creditors.*—Where a preferred creditor in an assignment has another fund to which he may resort for satisfaction, as between him and the other creditors, he is equally bound to resort to that fund.[6] But a judgment creditor, filing his bill after the assignment, in such a case has an inferior equity to the postponed creditors, and cannot compel the preferred creditors to seek satisfaction under the assignment to their injury.[7]

§ 484. *Coming in under Decree.*—Creditors may come in not only under an assignment, but under a decree made in a suit brought to enforce or avoid it.[8] When allowed to come in under such a decree, they must do so within the time limited for that purpose. They will not, however, be

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[1] Pearson v. Crosby, 23 Me. 261.

[2] Rev. Stat. (ed. 1857), p. 437, § 2; see act of March 21, 1844, c. 112.

[3] Bank of Bellows Falls v. Deming, 17 Vt. 366; and see Haskins v. Olcott, 13 Ohio St. 211; see Gross v. Bunn, 10 Neb. 217.

[4] Crutchfield v. Hudson, 23 Ala. 263.

[5] Varnum v. Evans, 2 McMullan, 409; Bank of Newberry v. Walker, 12 Rich. (S. Ca.) 304; Haskins v. Alcott, 13 Ohio St. 210, 235.

[6] Besley v. Lawrence, 11 Paige, 581; Paige, J., in Strong v. Skinner, 4 Barb. S. C. 546, 559.

[7] Besley v. Lawrence, 11 Paige, 581.

[8] See Parmelee v. Egan, 7 Paige, 610.

held strictly to the terms of the decree as to time, where the indulgence will not work injustice to other parties.[1]

[1] Pratt v. Rathbun, 7 Paige, 269. And see further, as to the course of proceeding in these cases, Wilder v. Keeler, 3 Paige, 164; Wilder v. Keeler, Id. 167; Morris v. Mowatt, 4 Paige, 142. A provision in a trust deed, that creditors coming in after a distribution has been made shall not disturb the distribution already made, but receive only the same percentage in the subsequent division which others receive, does not invalidate the deed. Pearson v. Rockhill, 4 B. Mon. (Ky.) 296.

CHAPTER XLIII.

RELEASES BY CREDITORS.

§ 485. It has already been observed,[1] that creditors who choose to come in under an assignment and claim the benefit of its provisions, must comply with such *conditions* as it prescribes. An important condition sometimes required of creditors (the validity of which, and of the instrument containing it, has already been sufficiently considered)[2] is the *release* or discharge of all their demands against the assignor. Assuming such a provision to be legal and valid, if the assignment itself contain a release, or stipulate for the execution of such an instrument, it must appear that the creditor coming in, and of whom it is required, has either executed the assignment itself, or a separate instrument of release, sufficient for the purpose. The execution of a release in one or the other of these forms is a condition precedent to obtaining a payment or dividend from the assignee, and the creditor can maintain no action for such dividend until he has performed such condition.[3]

Where a release is required by the assignment, it must be actually executed by the creditor; a mere *offer* to execute is not sufficient. Thus, where the trustee in an assignment for the benefit of such creditors as should, within sixty days, execute in favor of the assignor a release of all demands, gave public notice that a release would be prepared by him for the signature of the creditors, and one of the creditors called upon the trustee before the expiration of the sixty days and offered to execute the release, but was informed by him that the instrument was not prepared—it was held

[1] *Ante*, p. 726.

[2] See *ante*, pp. 251, *et seq.*

[3] Mather v. Pratt, 4 Dall. 224.

that the offer was not tantamount to a release, and that the creditor was, nevertheless, bound to execute a release in due form within the prescribed period.[1]

§ 486. *Time for Executing Release.*—Where a time is expressly limited by the assignment, within which the release must be executed, it must be executed within such time in order to secure to the creditor a share in the distribution by the assignee, and if it be signed afterwards, the releasor can take nothing under the assignment.[2] But it has been held in Pennsylvania, that he is nevertheless bound in such case by the release if there be no fraud or mistake, though the assignment be declared to be the consideration of the release.[3] It had been previously held, however, in the same State, that where a voluntary assignment had been made for the benefit of such creditors as should execute a release, a creditor who had notice of the assignment, but did not execute the release until after a dividend, was entitled to a proportion of that dividend.[4]

Where an assignment was made in favor of such creditors as should, "within sixty days from the date the of said instrument," execute a release, it was held that the day of the date was excluded.[5] But where the time given for executing a release expired on Sunday, it was held that that day was included, so that a creditor executing a release on the succeeding Monday was out of time.[6]

§ 487. *Form of Release.*—The form of the release required from creditors is sometimes prescribed by the assignment itself,[7] and in such case should be closely followed. Where this is not the case, the assignee may prepare a gen-

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[1] Pearpoint v. Graham, 4 Wash. C. C. 232.

[2] Coe v. Hutton, 1 S. & R. 398; Pearpoint v. Graham, *ubi supra.*

[3] Coe v. Hutton, *ubi supra.*

[4] Bank of Pennsylvania v. Gratz, 1 Browne, Appendix, 69.

[5] Pearpoint v. Graham, *ubi supra.* [6] Pearpoint v. Graham, *ubi supra.*

[7] See *ante*, p. 275; and see Sheepshanks v. Cohen, 4 S. & R. 35, cited *ante*, p. 472.

eral form to be executed by the creditors, of which he should give them notice.[1]

In any case the release should be under seal,[2] and free from any condition. Thus, where, under an assignment requiring a release from creditors, on or before a day named, certain creditors on that day wrote to the assignees, agreeing to become parties to the assignment and release left with the assignees, on condition that they should be paid twenty-five per cent. dividend on their claim, and expressing such letter to be a full and free discharge from all claims they might have against the assignors, the same as if they had signed the release in the hands of the assignees—it was held that such writing or paper was inoperative as a release under the assignment; first, because it was not under seal; and secondly, on account of the condition contained in it.[3]

Where an assignment stipulated for a full and complete release within a certain time, and a mercantile firm, creditors of the assignors, executed a general release under seal, and added to the signature the following words: "On condition that the assignment pays over 25–100 on our claim"—it was held that the condition was void, and the release single and absolute, and that it extinguished the debt.[4]

§ 488. *Delivery of Release.*—The terms of the stipulation for a release, as expressed in the assignment, usually are, that the creditors shall within the time specified, "make, execute and *deliver* a full and complete release of all claims," &c. The question of the sufficiency of a delivery occurred in the following case in Pennsylvania. A., by indenture dated the 28th of March, 1823, assigned all his estate to B., C. and D., in trust for creditors; but, in the first place, to pay and satisfy B. for any debt due to him, &c., provided that no creditor should have the benefit of the assignment, unless he did, within three months after the execution of the

[1] Pearpoint v. Graham, *ubi supra.*

[2] See Pond v. Williams, 1 Gray, 630; Shaw, C. J., Id. 636.

[3] Agnew v. Dorr, 5 Whart. 131.

[4] Tyson v. Dorr, 6 Whart. 256.

assignment, make, execute and deliver to the said grantor, a full and complete release of all claims, &c. At the time of the execution of the assignment, three general releases were prepared by the counsel of A., and delivered one to each assignee for the signature of the creditors. On the 23d of June, 1823, B. went to the office of his counsel, and there, in his presence and that of two students (one of whom became a subscribing witness), executed one of the releases, which, however, he put in his pocket, and with it left the office. A., who had left Philadelphia on the 17th of April, 1823, for New Orleans, returned there on the 30th of June, when the release was tendered to him, which he refused to receive, and it remained in the possession of B. It was held that there was sufficient evidence for the jury to find that the release was delivered within the three months.[1]

§ 489. *Construction of Releases.*—Several cases involving the construction of that clause of an assignment which requires the execution of a release, have been already given in a former chapter.[2] The following cases are here added.

S. owed M. eight hundred dollars, secured by mortgage. After the mortgage was recorded, G. obtained judgment against S. S. made an assignment in trust for his creditors, preferring among others M. for a debt due to him, of three hundred dollars, and after the preferences, then in trust for such of his creditors as should release him within sixty days. M. executed a release under the assignment, of all his demands, within the time limited, and afterwards S. took the benefit of the insolvent act, returning the mortgage as due. It was held that the mortgage was released, and G. was entitled to be paid first from the money raised on sale of the mortgaged premises, by execution.[3]

So a release, though expressed to be (as in the usual

[1] Steel v. Tuttle, 15 S. & R. 210.

[2] See *ante*, Chap. XXIV.

[3] Matlack's Appeal, 7 W. & S. 79.

form) in full of *all* demands, will not prevent the creditor executing it from retaining certain securities deposited with him by the debtor. This was decided in the following case. A. deposited with certain creditors, for collection, certain promissory notes payable to him. The creditors had previously discounted for A. an accommodation note drawn by B. in his favor, and indorsed by him; and this note falling due, and the creditors requiring another indorser, A. agreed that the creditors should hold the notes deposited, as collateral security for the payment of the note on which he was indorser. Shortly afterwards, A. made an assignment of all his property for the payment of such creditors as should execute a release of all demands, &c. The creditors holding the notes deposited, executed the release, and received certain dividends under the assignment. It was held that they had a right, nevertheless, to retain the notes deposited with them, until payment of the note discounted by them.[1]

§ 490. *Release, when Void.*—Where a release is obtained by fraud, it is void,[2] and the concealment of material facts from a creditor executing a release will sometimes have the effect of avoiding it.[3] Thus, where a debtor, being a member of a firm in which two others were dormant partners, executed an assignment to one of them, of all his estate for the payment of creditors, and a creditor who had sold goods to the debtor executed a release to him of all demands, in compliance with a stipulation in the assignment, it was held that the concealment of the fact of the partnership, at the time of the execution of the release, was a fraud upon the creditor which avoided the release.[4]

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[1] Lewis v. Bank of Penn Township, 3 Whart. 581.
[2] Ludwig v. Highley, 5 Barr, 132.
[3] Doe v. Scribner, 41 Me. 277.
[4] Carter v. Connell, 1 Whart. 392.

CHAPTER XLIV.

PROCEEDINGS BY CREDITORS TO ENFORCE THE TRUST.—SUITS AGAINST ASSIGNEE.

If the assignee neglect to execute the trust, or to account, or make distribution, or distribute wrongfully, a creditor claiming the benefit of the assignment may proceed against him by suit to enforce the trust, or to compel an account, or the payment of a distributive share of the proceeds; and the usual and appropriate remedy in all these cases, where no particular course of proceeding is prescribed by statute, is by bill in equity.[1] The jurisdiction of a court of equity for enforcing trusts is not taken away by the fact that the party has a remedy at law, especially where the party seeking relief is entitled to a discovery, or where the trustee is bound to state an account of the trust fund and its proceeds.[2]

§ 491. *Suit to Enforce Trust.*—If the assignee is remiss in executing the trust, as, if he neglect to collect the assets and render them available, or to settle the conflicting claims of creditors and adjust the respective amounts to be paid to each, the appropriate proceeding is by bill in equity to enforce a settlement of the accounts of the assignee, and a distribution of the assets among creditors.[3] And the suit may

[1] Ward v. Lewis, 4 Pick. 512, 522; First Congregational Society in Raynham v. Trustees, &c. 23 Pick. 148; Fitch v. Workman, 9 Metc. 517; Keyes v. Brush, 2 Paige, 311; Wright v. Henderson, 7 How. (Miss.) 539; Jones v. Dougherty, 10 Ga. 273; see Page v. Olcott, 28 Vt. 465; Durham v. Hall, 67 Ind. 123; Shyer v. Lockhard, 2 Tenn. Ch. (Cooper), 365; Geisse v. Beall, 3 Wis. 367. In this last case, the bill was for the removal of the assignee, and for an account, injunction and other relief. In Bellamy v. Bellamy's Adm'r (6 Fla. 62), the bill was for an account and the removal of the assignee.

[2] First Cong. Society in Raynham v. Trustees, &c. *ubi supra;* Hall v. Harris, 3 Ired. Eq. 389; McCrea v. Purmort, 16 Wend. 460; New York Ins. Co. v. Roulet, 24 Wend. 505.

[3] Fitch v. Workman, 9 Metc. 517; Wright v. Henderson, 7 How. (Miss.) 539.

be maintained by a creditor at large.[1] No action at law can be maintained by a creditor against the assignee until his accounts have been settled and a decree made for a distribution,[2] nor will a creditor be permitted to sustain such an action on the ground that the assignee has neglected to collect an amount due upon the sale of the assigned property, and apply it to the payment of the creditor in discharge of the trust.[3]

Assignments for creditors do not give the creditors any title to the property assigned, but only a right to enforce the duty undertaken by the assignees.[4]

Those whose claims assume a hostile attitude to the assignment cannot claim any interest under it, or insist on standing as parties to it.[5] Thus, where a creditor had attached assigned property, claiming that the assignment was invalid, he was not allowed to enforce payment of his distributive share.[6]

§ 492. *Time for Commencing Suit.*—The assignee is entitled to a reasonable time to wind up his trust, and if the creditors speed him before he has had that time, it will be at their own costs and charges.[7] On the other hand, too long a delay, as we have seen,[8] may have the effect of barring them of their remedy.

§ 493. *Parties.*—Where a bill is filed by a creditor to carry an assignment into effect, and to obtain his share of the trust fund, the other creditors provided for by the assign-

[1] Goncilier v. Forst, 4 Minn. 13; see Spicer v. Ayers, 2 N. Y. Supm. Ct. (T. & C.) 626; McCartney v. Bostwick, 32 N. Y. 53; Sweeny v. Sheriden, 37 N. Y. Supr. Ct. (J. & S.) 587; Bamberger v. Halberg, 78 Ky. (Rodm.) 376; and see also Ocean Nat. Bank v. Olcott, 46 N. Y. 12; and the South Carolina Statute, p. 747, *post*, note 1.

[2] Van Arsdale v. Richards, 1 Whart. (Penn.) 408; Gray v. Bell, 4 Watts (Penn.), 410; Nuckolls v. Tomlin, 9 Neb. 353.

[3] Bishop v. Houghton, 1 E. D. Smith, 566; Hexter v. Loughry, 6 Ill. App. (Bradw.) 362.

[4] Jefferie's Appeal, 33 Penn. St. 40.

[5] Jefferie's Appeal, 33 Penn. St. 40; Valentine v. Decker, 43 Mo. 583; see Hatcher v. Winters, 71 Mo. 30.

[6] Valentine v. Decker, *supra*.

[7] Sandford, V. C., in Jackson v. Cornell, 1 Sandf. Ch. 348.

[8] See *ante*, p. 690; and see Martin v. Price, 2 Rich. Eq. 412.

ment should be made parties, or it should be filed in behalf of the complainant and all others who may choose to come in under the decree.[1] So, where the object of the bill is to enforce a claim adversely to those of other creditors.[2] But where a bill for an account is filed against an assignee, by a general creditor who claims only the benefit of such a balance as shall remain after paying the preferred creditor in the assignment, such preferred creditors need not be made parties.[3] Creditors who are secured by a deed of trust, accepted by the trustee, may require the execution of the trusts, though not privy to the execution of the deed.[4]

In certain cases, the assignee is considered as representing the interests of all the parties, so that a suit will lie against him alone, without joining the others. Thus, in a case in Virginia, where A. & B. assigned property to C., in trust to pay debts of a former firm of A. & D., and certain debts of A. & B., and to pay the surplus to the order of A. & B.; and A. & B. gave an order on C., payable out of the surplus, to E.; and C. accepted it; and E. filed a bill against C. alone, for an account of the fund, and to have the surplus applied to satisfy his order, it was held that neither A. & B., nor A. & D., nor any other of the *cestuis que trust* were neces-

[1] Wakeman v. Grover, 4 Paige, 23; Bryant v. Russell, 23 Pick. 508; see Houghton v. Davis, 23 Me. 28; McDougal v. Dougherty, 11 Ga. 570; Brooks v. Peck, 38 Barb. 519; Mandel v. Peay, 20 Ark. 325; Weir v. Tannehill, 2 Yerg. (Tenn.) 57; Shyer v. Lockhard, 2 Tenn. Ch. (Cooper), 365; Dorr v. Gibboney, 3 Hughes, 382; see Perry on Trusts, § 885. Where there is more than one trustee, all are necessary parties. Perry on Trusts, § 876. Where the assignee is required to account under the interlocutory decree, provision is made in the decree for proper notice to parties to come in and present their claims. See *ante*, § 457.

Where a debtor had transferred his property to one who promised in the writing "to compromise or otherwise settle all the debts" of the grantor, it was held that the debtor was a proper co-plaintiff with the creditor who had accepted the agreement and brought an action thereon, and that a demurrer would not be sustained, on the ground that the debtor should have been made a defendant. Durham v Hall, 67 Ind. 123.

In an action under the Ohio statute to compel the assignee to allow as a claim, a note executed as a joint obligation of the assignor and another, it was held that the other obligor was not a necessary party. Goepper v. Heckle, 6 Am. L. Rec. 284.

[2] Rogers v. Rogers, 3 Paige, 379; see Brooks v. Peck, 38 Barb. 519.

[3] Page v. Olcott, 28 Vt. 465; Patton v. Bencini, 6 Ired. Eq. (N. Ca.) 304; and see as to parties, Geisse v. Beall, 3 Wis. 367; Armstrong v. Pratt, 2 Id. 299.

[4] Smith v. Turrentine, 8 Ired. Eq. 185.

sary parties, as the trustee represented all the interests of all parties.[1]

§ 494. *Pleadings.*—The grounds of the assignee's liability must be distinctly charged in the bill, as he will be held to account only for such neglects or breaches of duty as are charged.[2] A creditor's bill, filed by the beneficiaries, for the settlement of a deed of trust executed by the debtor, which required that the secured creditors should assent to its provisions within six months, must allege that the complainants assented to the deed.[3]

§ 495. *Defense.*—Where a suit is brought by creditors to enforce the trust against an assignee who has received the property of the debtor, he cannot set up fraud in making the assignment, as a defense to the suit, without showing that the fund has been recovered from him by the parties intended to be defrauded.[4] It is no excuse for not accounting, that the assignment is fraudulent and void as against creditors.[5] The fact that one or more of the creditors mentioned in an assignment allege a fraudulent preference in favor of other creditors, is no reason why a court of equity should refuse to hold the assignee to accountability.[6] Nor can the fact that the creditors or *cestuis que trust* named in an assignment have made arrangements in regard to the distribution of the estate different from that prescribed by the assignment be made available to the trustee in avoidance of his liabilities as such.[7] Where a trustee in a deed for the benefit of creditors without distinction or preference, in answer to a bill filed to enforce the trust, set up demands to a specific amount, as due to him by the grantor at the

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[1] Buck v. Pennybacker, 4 Leigh, 5. So in Maine, it has been held in case of an assignment of real estate, that it is not requisite, where a bill is filed against an assignee, to make the creditors parties. The assignee is supposed to represent and protect their interests. Johnson v. Candage, 31 Me. 28.

[2] Page v. Olcott, 28 Vt. 465.

[3] Colgin v. Redman, 20 Ala. 650.

[4] Seaman v. Stoughton, 3 Barb. Ch. 344.

[5] Geisse v. Beall, 3 Wis. 367, 383. See this case for forms of bill and answer.

[6] Geisse v. Beall, *ubi supra.*

[7] Geisse v. Beall, 3 Wis. 367; Lahm v. Johnston, 32 Ohio St. 590.

time of the execution of the deed; and after his death, the bill was revived against his administrator, who adopted the answer of his intestate, but subsequently filed a supplemental answer, insisting upon an additional claim, to which he alleged his intestate's estate was entitled, for money advanced and paid out by his intestate since the execution of the deed and the filing of his answer, on execution against the grantor, which created a lien superior to the deed of trust, it was held, 1, that payments on executions against the grantor, made by the trustee before the date of the deed, were not put in issue by the pleadings, and were properly disallowed; 2, that the answer of the trustee was an admission of the extent of the debt claimed by him at that time, and was conclusive until amended.[1]

§ 496. *Decree.*—Where all the effects of a trust estate have been converted into money, and the debt constituting a charge upon it is ascertained, the decree against the trustee, who is himself a creditor, should be for the balance that remains after deducting the dividend to which he is entitled, and not for the entire sum found in his hands.[2]

§ 497. *Statutory Proceedings.*—In New Jersey, it is provided by statute that the orphans' court of the proper county may, from time to time, if necessary, by citation and attachment, compel the assignee to proceed to the execution of the duties required by the act, until a final settlement and distribution.[3]

In Pennsylvania, the Court of Common Pleas of the proper county is the appropriate tribunal in which creditors may proceed to have the accounts of the assignee settled. The course is to cite the assignee, after the expiration of one year from the date of the assignment, to appear and exhibit, under oath or affirmation, the accounts of the trust, in such court, within a time specified.[4]

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[1] Harrison v. Mock, 16 Ala. 616. An unreasonable delay in the execution of the trust cannot be met by the fact that the assignee had a discretion as to the time and mode of sale, nor that the delay was advised by counsel. Hammond v. Stanton, 4 R. S. 65.

[2] Harrison v. Mock, *ubi supra.* [3] Rev. Stat. (ed. 1878), p. 41, § 28.

[4] Act of June 14, 1836, §§ 7, 8, *et seq.*; Purdon's Dig. p. 803; Whitney's Ap-

In Georgia, creditors of a common debtor cannot enjoin by injunction other creditors from prosecuting garnishment proceedings against trustees of the debtor, under deeds conveying his property for the benefit of his creditors generally or of certain preferred creditors.[1]

§ 498. *Action for Dividend.*—Where the trust has been so far executed that the distributive shares of the creditors have been ascertained by the assignee, and a dividend declared, an action will lie against him to recover such share or dividend, in favor of a creditor from whom it is withheld;[2] and such action may be either in the form of a bill in equity,[3] or action at law for money had and received.[4] But such an action will not lie in cases where a release is required of creditors, until a release has been executed;[5] nor, in Pennsylvania, until the assignee's accounts have been settled in the proper court, and a decree made for distribution;[6] nor will the assignee be compelled by *mandamus* to pay a percentage when the amount depends upon the construction of the deed.[7]

§ 499. *Interest, when Recoverable.*—Besides the amount of his share or dividend, the creditor from whom it is withheld will be entitled to recover *interest* from the assignee in all cases where the latter has unreasonably delayed to pay it over, or has neglected to inform the creditor of the dividend.[8] The general rule is that trustees of every descrip-

peal, 22 Penn. St. 500. See further, as to the proceedings in this State and others, *ante*, Chap. XXXIX.

[1] Nat'l Bank v. Printup, 63 Ga. 570; the garnishment proceeding being an adequate remedy under § 3541 of the code.

As to the right of a creditor to bring an action against the assignee as garnishee, see Smith v. Millett, 11 R. I. 528.

[2] Rush v. Good, 14 S. & R. 226; McLemore v. Nuckolls, 1 Ala. Sel. Cas. 591.

[3] Ward v. Lewis, 4 Pick. 518; Keyes v. Brush, 2 Paige, 311.

[4] McCrea v. Purmort, 16 Wend. 460; Cowen, J., Id. 465; New York Ins. Co. v. Roulet, 24 Wend. 505; Fitch v. Workman, 9 Metc. 517.

[5] Mather v. Pratt, 4 Dall. 224; Bank of Penn. v. Gratz, 1 Browne (Penn.), Appx. 69.

[6] Van Arsdale v. Richards, 1 Whart. 402; Gray v. Bell, 4 Watts, 410.

[7] Hulse v. Marshall, 9 Mo. App. 148.

[8] Gray v. Thompson, 1 Johns. Ch. 82; Minuse v. Cox, 5 Id. 441; Lomax v.

tion, neglecting to apprise those interested in the trust fund of the amount due to them, and to offer payment in a reasonable time, are chargeable with interest, and a demand by legatees, heirs, or creditors, is not necessary.[1] In a case in New York, where an assignee, after having converted the assigned property into money, retained it in his hands for several years without making distribution, and a creditor filed a bill against him, he was decreed to pay the amount of the debt, with interest from the time he received the money, and with the costs of suit.[2]

§ 500. *Actions in other cases.*—If an assignee violates his trust, to the injury of a particular *cestui que trust*, the latter has his separate remedy in equity.[3] So, if there be a breach of the assignee's covenants to the injury of any one covenantee, he may maintain an action at law, without joining the other covenantees.[4]

In those States where bonds are required of assignees, they are sometimes declared to inure to the use and benefit of all the creditors, or persons interested in the assignment.[5] In Missouri, any person injured by breach of the condition of an assignee's bond, may sue thereon in the name of the State, for his use.[6]

In New York any action brought upon an assignee's bond may be prosecuted by a party in interest by leave of the court; and all moneys realized thereon must be applied by direction of the county judge, in satisfaction of the debts of the assignor, in the same manner as the same ought to have been applied by the assignee.[7]

Pendleton, 3 Call, 538; Estate of Merrick, 1 Ashm. 305; Bedell v. Janney, 9 Ill. 193; and see Lindsey v. Platner, 23 Miss. 576.

[1] Estate of Merrick, 1 Ashm. 305; Clark v. Craig, 29 Mich. 398; Rosenberg v. Moore, 11 Md. 376.

[2] Gray v. Thompson, 1 Johns. Ch. 82.

[3] Dimmock v. Bixby, 20 Pick. 368.

[4] Id. ibid. See Dorr v. Gibboney, 3 Hughes, 382.

[5] Pennsylvania act of June 14, 1836, § 6; Purdon's Dig. (Brightley, 10th ed.) p. 1416, pl. 6.

[6] 1 Stats. of Mo. (Wagner, 1870), p. 152, § 10; R. S. (1879), § 368.

[7] Laws of 1877, c. 466, § 9; 3 R. S. (7th ed.) p. 2278, § 9.

CHAPTER XLV.

PROCEEDINGS OF CREDITORS IN OPPOSITION TO THE ASSIGNMENT AND IN AVOIDANCE OF IT.

Having considered the proceedings on the part of the creditors of the assignor, in cases where they *accept* of the provisions of the assignment, and elect to enforce the trust against the assignee, it remains to consider the nature and course of their proceedings where they *repudiate* the assignment, and refuse to come in under it.

In cases of apparent fraud or obvious illegality, the course is sometimes adopted of treating the assignment as a *nullity*, and proceeding as though it had not been made. But the usual course taken by creditors, where an assignment has been made which is regarded as fraudulent and void as against them, is to assail it by hostile proceedings in courts of competent jurisdiction, for the express purpose of having it judicially declared to be void, and set aside for their benefit.

§ 501. *Treating the Assignment as a Nullity.*—The right to treat an assignment as a nullity, in certain cases, is, in some States, expressly given to creditors by statute. Thus, in Delaware, if an assignment is made with preferences, contrary to the statute, it is absolutely void, and the estate, goods, chattels, or effects, contained in such assignment, are declared to be liable to be taken in execution or attached for the payment of the debts of the assignor, in the same manner and to as full an effect as if no such assignment had been made.[1] In other States, the same right is recognized by decisions of the courts. In Illinois, if an as-

[1] Laws of Delaware (ed. 1829), pp. 140, 141; Rev. Code of Del. (ed. 1874), p. 785, c. 132, § 4.

signment contain a condition of release, without provision for full payment of the creditors, it is void as to creditors not parties, and they may proceed to judgment and levy execution upon the property assigned, as long as it remains in the possession of the assignor or assignees, as though the assignment had not been made.[1] In Pennsylvania, it has been expressly held that where an assignment is tainted, with either moral or legal fraud, the property does not pass, but remains in the debtor, liable to the execution of creditors who have not assented to the assignment.[2] And the course of treating the assignment as a nullity, and seizing and selling the property under execution or attachment, in opposition to it, has been frequently approved by the courts.[3]

It is now settled in New York that an attachment cannot be levied on property in the hands of the assignee under a general assignment of all the property of the debtor, notwithstanding the assignment is fraudulent in law.[4]

Where the assigned property has been thus seized by a creditor, the assignee may bring an action of trespass, and this will raise the question as to the validity of the assignment.[5] In some States, the validity of an assignment alleged to be fraudulent, may be tried in a court of law, upon an issue made between an attaching creditor and the assignee summoned as garnishee, under the provisions of the law relating to attachments.[6]

A creditor cannot avoid an assignment merely on the ground that it contains a provision which is illegal, unless

[1] Ramsdell v. Sigerson, 2 Gilm. 78.

[2] McClurg v. Lecky, 3 Penn. R. 83, 94; Irwin v. Keen, 8 Whart. 347, 355.

[3] In re Wilson, 4 Barr, 430; Seal v. Duffy, Id. 274; Coulter, J., in Mitchell v. Stiles, 13 Penn. St. 306, 309, 310: Isham, J., in Bishop v. Hart's Trustees, 28 Vt. 71, 74; Aspinwall v. Jones, 17 Mo. 209; but see Antignance v. Central Bank of Georgia, 26 Miss. 110; see Lane's Appeal, 82 Penn. St. 289.

[4] Thurber v. Blanck, 50 N. Y. 80; Smith v. Longmire, 24 Hun, 257; Milliken v. Dart, 26 Id. 24; but see Carr v. Van Hoesen, Id. 316.

[5] Mussey v. Noyes, 26 Vt. 462; Hutchinson v. Lord, 1 Wis. 286.

[6] Lee v. Tabor, 8 Mo. 322; Hardcastle v. Fisher, 24 Id. 70; Keep. v. Sanderson, 2 Wis. 42 As to the course of proceedings in Vermont, see Bishop v. Hart's Trustees, 28 Vt. 71; Isham, J., Id. 72, 74.

such provision tends to his injury.[1] So a partnership creditor cannot attack an assignment of partnership and individual property on the ground that, by its provisions, creditors of the partners, individually, are hindered and delayed.[2]

§ 502. *Proceedings to Set Aside the Assignment.*—If, instead of treating the assignment as a nullity, the creditor elects to have it declared void and set aside judicially, the proceeding is by bill in equity, or equivalent proceeding, praying for a decree to that effect. And the prayer of the bill is also, usually, for an injunction, to prevent further proceedings under the assignment, and for a receiver to take possession of the property or its proceeds.

§ 503. *Who may Assail the Assignment.*—This course, however, cannot be taken by all descriptions of creditors, nor under all circumstances. Thus, none but judgment creditors can attack an assignment as fraudulent or invalid.[3]

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[1] Fox v. Heath, 16 Abb. Pr. 163.

[2] Morrison v. Atwell, 9 Bosw. 503; see *ante*, p. 300.

[3] Hastings v. Belknap, 1 Den. 190; Henriques v. Hone, 2 Edw. Ch. 120; Lawton v. Levy, Id. 197; Neustadt v. Joel, 2 Duer, 530; Reubens v. Joel, 13 N. Y. 488; Coope v. Fowles, 18 Abb. Pr. 442; 42 Barb. 87; Pennington v. Woodall, 17 Ala. 685; Berryman v. Sullivan, 13 Sm. & M. 65; Caswell v. Caswell, 28 Me. 232; Spear v. Wardell, 2 Barb. Ch. 291; Cropsey v. McKenney, 30 Barb. 47; Heacock v. Durand, 42 Ill. 230; Oberholser v. Keefer, 47 Ga. 530; Fry v. Soper, 39 Mich. 727; Tennant v. Battey, 18 Kans. 324; Johnson v. Farnum, 56 Ga. 144; Mayer v. Wood, Id. 427; see Morgan v. Bogue, 7 Neb. 429.

A fraudulent assignment is not so absolutely void that a creditor's right to complain of it may not be lost by waiver or acquiescence, and he cannot attack it until he has in some way acquired a legal standing, and he may let it alone if he chooses to do so. Blake v. Hubbard, 45 Mich. 1.

But a judgment for costs, recovered after the assignment, does not make the owner a creditor entitled to dispute the assignment. Ogden v. Prentice, 33 Barb. 160. The action may be commenced forthwith upon the return of the execution, although the sixty days within which the sheriff may make the return have not expired. Knauth v. Bassett, 34 Barb. 31. In Loring v. Pairo (10 Iowa, 282), it was held that the action could be maintained before the return of the execution. A deed fraudulent as to creditors can be avoided only by a judgment creditor, or one claiming under him, who has taken out execution and levied upon the property fraudulently conveyed. Fox v. Willis, 1 Mich. 321; and see Meux v. Anthony, 11 Ark. 411. A creditor has a right to file a bill to set aside the debtor's conveyance as soon as he has obtained a judgment which is a lien on the property. The Mohawk Bank v. Atwater, 2 Paige, 54. The levying of an attachment upon the assigned property, and the perfecting of judgment and issuing an execution thereon, does not give the attaching creditor the right to maintain an equitable action in his own name, to enforce his lien by setting aside a fraudulent transfer. Thurber v. Blanck, 51 N. Y. 80; Wilson v. Forsyth, 24 Barb. 105; *contra*, Mechanics' & Traders' Bank v. Dakin, 51 N. Y. 519; Heye v. Bolles, 33 How. Pr.

A distress warrant, though levied, is not equivalent for this purpose to judgment and execution.[1] So creditors who have confirmed a fraudulent assignment, by receiving a benefit under it, or have become parties to it voluntarily and with a full knowledge of all the circumstances, are estopped from afterwards impeaching it.[2] But where the partner of a creditor had received a payment on account of his debt, from the assignee, but he had been informed that the creditors were all to share alike under the assignment, and he was ignorant of the fraudulent circumstances connected with it, it was held that he was not by such receipt precluded from setting aside the assignment for fraud.[3] And,

266; s. c. 2 Daly, 231; Greenleaf v. Mumford, 19 Abb. Pr. 469; s. c. 30 How. Pr. 30. In Maryland, prior to the act of 1835, c. 380, the general rule was that a creditor, before he could in equity pursue property fraudulently conveyed, must have first obtained a judgment with respect to realty, and a judgment and *fieri facias* where personal property was to be reached. But the act of 1835, c. 380, § 2, expressly exempted creditors from the obligation to obtain judgments before they can proceed in equity to vacate fraudulent conveyances. Swan v. Dent, 2 Md. Ch. Dec. 111; Sanderson v. Stockdale, 11 Md. 573. So in Missouri, a judgment lien is not necessary to sustain a creditor's bill. Alnutt v. Leper, 48 Mo. 319. A deed fraudulent and void as against the grantor's antecedent creditors, is valid if recorded as against subsequent creditors, when there is nothing in the deed itself and no evidence to show any intent or design to defraud such creditors. Kane v. Roberts, 40 Md. 590; see Shafer v. Alden, 2 Ind. 42.

Under the Ohio act of 1863 (S. & S. 379), § 17, any creditor, whether his claim be reduced to judgment or not, could bring an action to set aside a fraudulent conveyance. Under § 15 of the code there is a limitation of four years after the discovery of the frauds. Combs v. Watson, 32 Ohio St. 228.

It has been provided in South Carolina by a late statute that any creditor may attack an assignment or enforce its provisions without first obtaining and entering up judgment. See Laws of 1882, p. 848.

The creditors and stockholders of a bank will not be enjoined, at the instance of its general assignee, from instituting suit against him, the creditors not having accepted the assignment nor reduced their demands to judgment against the bank, and they having a clear right to proceed in order to fix a personal liability on the stockholders imposed by the charter, to which proceedings they may desire to make the assignee a party in order to reach the assets in his hands. Gresham v. Crossland, 59 Ga. 270.

[1] Hastings v. Belknap, 1 Den. 190.

[2] Adlum v. Yard, 1 Rawle, 163; Burrows v. Alter, 7 Mo. 424; Rapalee v. Stewart, 27 N. Y. 311; Lanahan v. Latrobe, 7 Md. 268; Richards v. White, 7 Minn. 345; Scott v. Edes, 8 Minn. 377; Valentine v. Decker, 43 Md. 583; Doub v. Barnes, 1 Md. Ch. 127; Therasson v. Hickok, 37 Vt. 454; Frierson v. Branch, 30 Ark. 453.

[3] Van Nest v. Yoe, 1 Sandf. Ch. 4.

Where a partner sold out to his copartner, who afterwards made an assignment, under which the assignee sold some of the firm assets, as alleged, fraudulently, and subsequently a judgment for a partnership debt was recovered against both partners; it was held that the selling partner was not in a position to question the *bona fides* of the assignment. Vosper v. Kramer, 31 N. J. Eq. 420.

in general, creditors cannot claim the benefit of an assignment, and at the same time attack it as invalid.[1] Thus, if a complainant claim a beneficial interest in an assignment, he is not entitled to any relief on the ground that it is fraudulent, or was intended to defraud creditors.[2]

By statute in New York, an executor or administrator represents creditors, and has power to assail an assignment made by the decedent in his lifetime in fraud of his creditors,[3] and if he refuses to do so the creditors may, by action against the personal representatives and the assignee, have the assignment set aside,[4] and the same rule prevails in other States.[5] By virtue of the same statute, an assignee for the benefit of creditors may avoid a previous fraudulent assignment of the grantor; but the fact that this power is conferred upon the assignee will not be a defense to the assignor against an action brought by a creditor, where the assignee is not made a party, and no objection is made on the ground of a defect of parties.[6] But a trustee who has executed a trust deed and accepted the trust, cannot assail it as fraudulent, and subject the property to the payment of a debt due to himself from the grantor.[7]

In the case of Hooper v. Tuckerman,[8] in the Superior Court of the city of New York, it was held that the assignees of an insolvent debtor, under the insolvent laws of Massachusetts, might file a bill in the courts of New York, to set aside an assignment of personal property made in New York, which was void as against creditors by the law of this State. But in the case of Betton v. Valentine,[9] in the Cir-

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[1] Hatcher v. Winters, 71 Mo. 80.

[2] The Ontario Bank v. Root, 3 Paige, 478; and see Pratt v. Adams, 7 Paige, 615; Greene v. Morse, 4 Barb. S. C. 332; Lanahan v. Latrobe, 7 Md. 268; Geisse v. Beall, 3 Wis. 307; but see Crutchfield v. Hudson, 23 Ala. 393.

[3] Act of 1858, c. 314; 3 Rev. Stat. (7th ed.) p. 2330.

[4] Bate v. Graham, 11 N. Y. 237; see Bryant v. Bryant, 2 Robt. 612.

[5] Holland v. Cruft, 20 Pick. 321; see Caswell v. Caswell, 28 Me. 232.

[6] Fort Stanwix Bank v. Leggett, 51 N. Y. 552.

[7] Strong v. Willis, 3 Fla. 124.

[8] 3 Sandf. S. C. 311.

[9] 1 Curt. 168.

cuit Court of the United States for the district of Rhode Island, the contrary doctrine was maintained, the court holding that the assignee of an insolvent debtor, appointed under the laws of the State of Massachusetts, does not so far represent creditors in the State of Rhode Island as to be able to avoid a conveyance of personal property in the latter State, good as against the insolvent, but invalid as against creditors by the law of Rhode Island.

In New York a receiver, appointed by a judge in proceedings supplementary to execution, represents the creditors, and may therefore maintain an action to set aside an assignment of real and personal property made by the debtor in fraud of his creditors.[1] By the act of April 17, 1858,[2] receivers, as well as assignees and other trustees of an insolvent estate, corporation, partnership, or individual, may, for the benefit of creditors or others interested, disaffirm, treat as void, and resist all acts done and transfers made in fraud of the rights of any creditor interested in the property held by them.

Where a State court has appointed a receiver of the property of a corporation, and a fraudulent assignment has been subsequently made of the same, a United States court will not enjoin the assignee from receiving such corporate property from the receiver, in case the State court having control thereof orders it to be turned over to him.[3]

§ 504. *Parties to Bill.*—Where a creditor proceeds in this way to set aside an ordinary assignment on the ground

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[1] Porter v. Williams, 9 N. Y. 142; but see Seymour v. Wilson, 16 Barb. 294; Hayner v. Fowler, Id. 300.

The receiver does not acquire *ipso facto* by virtue of his appointment, a title to property previously fraudulently assigned, nor any lien thereon, until suit to set it aside, or other legal proceedings, or notice of his claim to treat the assignment as void; and if no such suit or proceedings are brought or taken by such receiver until after the commencement of proceedings in bankruptcy, the receiver has no title to the property superior to the assignee, nor can he thereafter, under the rule established by the Supreme Court (Glenny v. Langdon, 98 U. S. 20), maintain an action to vacate the fraudulent assignment. Olney v. Tanner, 10 Fed. Reptr. 101.

[2] Laws of 1858, p. 506, c. 314. See *ante*, p. 152.

[3] Hutchinson v. Green, 2 McCrary, 471.

of fraud, he need make only the assignor and assignee defendants, without joining other creditors as parties, and may file the bill in his own name and behalf.[1] But it has been held that several judgment creditors may join as complainants in filing one bill.[2] And in cases of deeds of trust to secure creditors, all the persons secured by the deed either directly or indirectly, if named in it, are necessary parties to a bill assailing the deed as fraudulent as to some of the *cestuis que trust*, and seeking a distribution of the trust fund.[3]

§ 505. *Form of Bill.*—The bill may be framed either with the single view of setting aside the assignment as fraudulent, and applying the property to the payment of the complainant's judgment, or it may be framed with a double aspect—first, of setting aside the assignment, and in failure of that object, then of obtaining a decree against the assignee for an account, in behalf of the complainant and other creditors, with a prayer accordingly. A creditor is not entitled to a decree for an account against a trustee, when his bill is framed with a single view of setting aside the deed of assignment under which the trustee holds, and of obtaining satisfaction of his judgment.[4]

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[1] Wakeman v. Grover, 4 Paige, 23; Rogers v. Rogers, 3 Id. 379; Russell v. Lasher, 4 Barb. S. C. 232; Lawrence v. Bank of the Republic, 35 N. Y. 320; Hulbert v. Dean, 2 Abb. Dec. 428; s. c. 2 Keyes, 97. Preferred creditors may apply to be made parties. Chandler v. Powers, 25 Hun, 445.

In a proceeding supplementary to execution under 2 R. S. (1876), § 522, p. 231, to reach property of the execution debtor, alleged to be in the possession of a third person, who set up in his answer a voluntary assignment to him by the debtor, which assignment was invalid, because neither assented to by the execution creditor, nor filed or recorded, it was held that the other creditors were neither necessary nor proper parties. Eden v. Everson, 65 Ind. 113.

[2] Lentilhon v. Moffatt, 1 Edw. Ch. 451.

[3] Billups v. Sears, 5 Gratt. 31: Stout v. Higbee's Executors, 4 J. J. Marsh. 632. Where the maker of a deed of trust, which has not been accepted by the trustee, files his answer to a bill which seeks to enjoin him and the trustee from disposing of the property, this makes no issue upon which a decree can be had, the beneficiaries not being parties to the original bill, and as this is not a proper subject for a cross-bill, the beneficiaries cannot be made parties to the defendant's answer, though filed as a cross-bill for that purpose. Masson v. Anderson, 3 Baxter (Tenn.), 290.

[4] Cunningham v. Freeborn, 11 Wend. 240, 257. Where the complaint failed to allege the delivery and acceptance of the assignment by the assignee, and his

§ 506. *Proof.*—The fraud charged in the bill, if denied in the defendant's answer, must, as already mentioned, be established by proof.[1] A court of equity, however, is held to be competent to pronounce upon the question of fraudulent intent in a case submitted on bill and answer, notwithstanding the denial of such intent in the answer, if the facts of the case be such as to produce a conviction of the fraudulent intent. But where the facts stated are not conclusive evidence of fraud, but merely *indicia* or badges of fraud, they are countervailed by the denial of the fraudulent intent. And if a party relies upon such facts and circumstances, he must put in a replication, and give his opponent an opportunity to produce proof in explanation of the facts casting suspicion on the transaction.[2]

§ 507. *Decree and Subsequent Proceedings.*—If the creditor who assails the assignment succeeds in establishing a case of fraud, a decree is made by the court, declaring the instrument void, and appointing a receiver, through whom, as its officer, the court takes possession of the property and appropriates it.[3] The effect of the decree is to declare the assignment void *in toto*, as respects those who impeach it, and it gives to them the benefit of their legal diligence.[4] But the court does not declare it void as to other persons, nor

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acceptance of the trust, it was held that the action might be maintained to compel the assignee to disclaim title under it. Gasper v. Bennett, 12 How. Pr. 307.

A suit to set aside, on the ground of fraud, a conveyance by a debtor of land not included in his assignment, should not be joined with a suit for an accounting under the assignment. Hatcher v. Winters, 71 Mo. 30.

[1] Dunham v. Gates, 3 Barb. Ch. 196; Bogert v. Haight, 9 Paige, 297, 302; Vernon v. Morton, 8 Dana, 247; Stout v. Higbee's Executors, 4 J. J. Marsh. 632. As to evidence in regard to the consideration of a deed of trust, see Pennington v. Woodall, 17 Ala. 685.

[2] Cunningham v. Freeborn, 11 Wend. 240; Redmond v. Wemple, 4 Edw. Ch. 321, acc.

[3] Henriques v. Hone, 2 Edw. Ch. 120, 124; see Terry v. Butler, 43 Barb. 395.

A decree appointing a receiver and directing an accounting, is a final judgment reviewable by appeal. The assignee will be directed to account before a referee. Produce Bank v. Morton, 67 N. Y. 199.

[4] Atkinson v. Jordan, Wright (Ohio), 247; Barrett v. Reid, Id. 700; Dickson v. Rawson, 5 Ohio St. 218. In Ohio, all fraudulent conveyances inure as assignments for creditors, to the equal benefit of all creditors. See *ante*, p. 223; and see Jamison v. NcNally, 21 Ohio St. 295.

will it set it aside as a nullity between the parties to the instrument.[1]

An assignment in fraud of creditors is good against a receiver in supplementary proceedings, as merely the representative and successor of the judgment debtor; and as representative of the creditor, he has no greater right than the creditor himself with reference to the property fraudulently assigned, which right is to avoid and set aside such assignment so far only as shall be necessary to satisfy his debt and costs.[2]

Where the assignment is set aside for fraud, the assignees will not be answerable for payments made under it to *bona fide* creditors before the filing of the bill,[3] or money retained under it by him as a *bona fide* creditor.[4]

If the assignor and assignee collude with a complainant, and permit a decree setting aside the assignment, the creditors provided for by it will be relieved against the decree. But if the decree could not have been prevented, its being by default or consent will not prejudice the assignee.[5]

Where an assignment by an intestate is set aside in a court of equity on the application of his administratrix, on the ground that it was made to defraud his creditors, and the whole of the property assigned is required for the payment of the creditors, the fraudulent assignee will not be allowed to deduct and retain the amount of the consideration paid by him for the assignment.[6]

Creditors who have filed bills to set aside a deed of trust, and subject the effects conveyed to their debts, and have

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[1] Smith v. Howard, 20 How. Pr. 121; and see Edwards on Receivers (2d. ed.), 408, 474, 475.

[2] Bostwick v. Menck, 40 N. Y. 383.

[3] Wakeman v. Grover, 4 Paige, 24; Ames v. Blunt, 5 Id. 13; Platt v. Archer, 13 Blatch. 351; Havemeyer v. Loeb, 5 Abb. N. C. 338; see *ante*, pp. 698–700. He is not bound to account for rents received and applied according to the terms of the trust, before the commencement of the suit. Collumb v. Read, 24 N. Y. 505.

[4] Peacock v. Tompkins, Meigs, 317.

[5] Russell v. Lasher, 4 Barb. S. C. 232.

[6] Holland v. Cruft, 20 Pick. 321.

failed in that object, the deed being valid, may have the benefit of the surplus after the claims provided for in the deed are satisfied. But where it is obvious that there is no surplus, their bills may be dismissed at once.[1]

Where certain creditors, secured by an assignment, bring a suit on behalf of all creditors secured thereby, to set aside a prior assignment and appeal, the matter in dispute as regards them is simply their proportionate share in the fund that would be realized in the event of success, and not the entire fund; nor can any portion of the fund that would go to creditors not before the court be taken into account, so as to make up the amount necessary to give jurisdiction to the circuit court.[2]

[1] Vernon v. Morton, 8 Dana, 247.

[2] Chatfield v. Boyle, 4 Morr. Trans. 81.

APPENDIX.

APPENDIX OF FORMS AND PRECEDENTS.

I. ASSIGNMENTS BY INDENTURE BIPARTITE.

1. A General Assignment of Real and Personal Property for the benefit of Creditors Ratably.

This indenture, made this day of , in the year , between , of , party of the first part, and , of , party of the second part, witnesseth that, whereas the party of the first part is indebted to divers persons in sundry sums of money, which he is unable to pay in full, and is desirous of providing for the payment of the same so far as in his power, by an assignment of all his property for that purpose: Now therefore the said party of the first part, in consideration of the premises and of the sum of one dollar, to him paid by the party of the second part upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the second part, his successors and assigns, all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, promissory notes, debts, claims, demands, property and effects of every description belonging to the party of the first part, whereever the same may be, except such property as is exempt by law from levy and sale under execution, to have and to hold the same, and every part thereof, unto the said party of the second part, his successors and assigns: In trust, nevertheless, to take possession of the same and to sell the same with all reasonable dispatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collections—

1. To pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment and

of carrying into effect the trust hereby created, together with a lawful commission to the party of the second part for his services in executing said trust.

2. To pay and discharge in full, if the residue of said proceeds is sufficient for that purpose, all the debts and liabilities now due or to grow due from the said party of the first part, with all interest money due or to grow due, and if the residue of said proceeds shall not be sufficient to pay the said debts and liabilities and interest moneys in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

3. And if, after the payment of all the said debts and liabilities in full, there be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, his executors, administrators and assigns.

And in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part his true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts and demands due, owing and belonging to the said party of the first part, and to give acquittances and discharges for the same, to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances. And the said party of the first part does hereby authorize the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note or other instrument in writing which is payable to the order of the said party of the first part, or to sign the name of the party of the first part to any instrument in writing whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said party of the first part, that he will faithfully and without delay execute the trust created according to the best of his skill, knowledge and ability.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in presence of } [SEAL.] [SEAL.]

STATE OF NEW YORK, *City and County of New York,* } ss.:

On this day of , in the year of our Lord one thousand eight hundred and eighty- , before me came , to me personally known, and known to me to be the persons described in and who executed the above instrument, and each for himself severally acknowledged that he executed the same.

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2. Assignment Bipartite, with Preferences.[1]

This indenture, made this thirteenth day of February, in the year of our Lord one thousand eight hundred and fifty-eight, between Augustus G. Mansfield, of the town of Marengo, county of McHenry, and State of Illinois, of the first part, and Anson Sperry, of the same place, party of the second part. Whereas, the said party of the first part is indebted to divers persons in divers sums of money, which, by reason of difficulties and misfortunes, he has become at present unable to pay, and is desirous of providing for the payment thereof by an assignment of his property and effects for that purpose, not exempt to him by the laws of the State of Illinois:

Now this indenture witnesseth that he, the said party of the first part, in consideration of the premises and of the sum of one dollar, to him in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over to the said party of the second part, his heirs, executors, administrators and assigns, all and singular the lands, tenements, hereditaments and appurtenances, goods, chattels,

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[1] This deed is taken from Sackett v. Mansfield, 26 Ill. 22, 23, 24. See remarks of Breese, J., in reference to its provisions. Ibid. 27.

accounts, promissory notes, debts, choses in action, claims, demands, property and effects of every description belonging to the said party of the first part, or in which he has any right or interest now due or payable, or to become due or payable, to the party of the first part, except what are exempt to him by the law of the State of Illinois, the same being fully and particularly enumerated and described in a schedule thereof hereto annexed, marked "Schedule A." Also the books of account of the said party of the first part, and all papers, documents and vouchers relating to his business, dealings, property or affairs. To have and to hold the same, and every part and parcel thereof, unto the said party of the second part, his heirs, executors, administrators and assigns. In trust, nevertheless, and to and for the uses, interests and purposes following, that is to say:

That the said party of the second part shall take possession of the said property hereby assigned, or intended so to be, and shall, with all convenient diligence, sell and dispose of the same at public or private sale, as he may deem most beneficial to the interest [1] of the creditors of the said party of the first part, and convert the same into money, and shall also, with all reasonable diligence, collect, get in and recover all and singular the said debts, dues, bills, bonds, notes, accounts and balances of accounts, judgments, securities, claims and demands hereby assigned, or intended so to be, and with and out of the proceeds of said sales and collections, that the said party of the second part shall first pay and disburse all the just and reasonable expenses, costs, charges, and commissions attending the due execution of these presents, and the carrying into effect the trusts hereby created, together with a reasonable compensation or commission for his own services, and shall also pay the taxes now due, or to grow due, from and upon the premises at present occupied by the said party of the first part, until the said property and effects hereby assigned shall be sold and disposed of, and with and out of the residue, or net proceeds of such sales and collections, shall pay and discharge the debts due and owing by the said party of the first part to and in the order and manner following, that is to say:—

[1] The controversy in the case of Sackett v. Mansfield, 26 Ill. 21, from which this form is taken, turned upon the propriety of this provision, and it was there held not to indicate a fraudulent intent on the part of the grantor.

First. The said party of the second part shall pay all and singular the debts set forth and enumerated in a schedule of debts hereto annexed, marked "Schedule B," and designated in said schedule as class No. one, the same to be paid with lawful costs and interest, if the said proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the net proceeds to and in the payment of the said debts ratably and in proportion to the respective amounts thereof.

Secondly. After the payment in full of all the debts designated in Schedule B, as number one, in manner above directed, the said party of the second part shall pay in full, all and singular, the debts enumerated and designated as class number two, and all other indebtedness due and owing by said party of the first part, to any person or persons whomsoever, if there be sufficient of the said net proceeds remaining in his hands for that purpose, and if there be not sufficient, then the said party of the second part shall apply the same as far as they will go for that purpose, to and in payment of the last mentioned debts ratably and in proportion to the respective amounts thereof.

Lastly. After the payment of all the costs and charges and expenses attending the execution of the trust hereby created, and the payment and discharge in full of the lawful debts due and owing by the said party of the first part of any and every kind and description, if any part or portion of the proceeds of said sales and collections shall remain in the hands or control of the said party of the second part, his executors, administrators and assigns, he or they shall return the same to the said party of the first part, his executors, administrators and assigns, and if, after payment in full of all the said debts, there should remain in the hands or possession of the said party of the second part, his executors, administrators, or assigns, any part or portion of the property and effects hereby assigned, which shall not have been sold or collected, or converted into money, he or they shall return, reassign and redeliver the same to the said party of the first part, his heirs, executors, administrators or assigns. And for the better and more effectual execution of these presents, and of the trusts hereby created and reposed, the said party of the first part doth hereby make, constitute and appoint the said party of the second part his true and lawful attorney, irrevocable, with full power and authoriry to do, transact and per-

form all acts, deeds, matters and things which may be necessary in the premises, and to the full execution of the said trust, and for the purposes of said trust to ask, demand, recover and receive of and from all and every person or persons all the property, debts, demands, belonging and owing to the said party of the first part, and to give acquittances and discharges for the same, and to sue, prosecute and defend for the same, and to execute, acknowledge and deliver all necessary deeds and instruments of conveyance, and also for the purposes aforesaid, or any part thereof, to make, constitute and appoint one or more attorneys under him, and at his pleasure to revoke the same, hereby ratifying and confirming whatever the said party of the second part, or his substitutes shall lawfully do in the premises.

In witness whereof, the said Augustus G. Mansfield, party of the first part to these presents, has hereunto set his hand and seal the day and year first above written.

[L. S.]

SCHEDULE A.

Referred to in the foregoing assignment.

Real Estate.

All that certain messuage or dwelling-house and lot, piece or parcel of land, situate, lying and being on the southerly side of street, between and streets, in the ward of the city of , and known and distinguished as Number street, &c. [*describing it*].

All that certain lot, piece or parcel of land, situate, &c., in the town of in the county of and State of , and known and described as follows, to wit: [*description.*] Subject to a mortgage to J. A., of , for one thousand dollars.

Personal Estate.

Goods and merchandise now in the store No. street, in the city of , as follows, to wit: [*giving the items.*]

Household furniture now in the house No. street, in said city, as follows, to wit: [*giving the items.*]

One-half of a cargo of iron on board the ship , now on the homeward voyage from , as per bill of lading and invoice delivered.

Stocks.

Ten shares of the	Insurance Company,	$1,000
Ten shares of the	Land Company,	
Four shares of the	Banking Company,	

Bonds and Notes.

A bond executed by E. J. to the said J. D., dated , conditioned for the payment of two thousand dollars, on which is now due	$1,500
W. & M.'s note in favor of B. M., at six months from Aug. 20th, 1850,	1,000
N. T.'s note in favor of L. E., at four months from [*date*],	1,000

Judgments.

A judgment recovered by the said J. D. against T. F., in the Superior Court of the city of New York,	$550 75
A judgment recovered against S. R., in the [*court*],	427 00

Claims.

A claim for insurance on one-half interest in Brig at the Insurance Office,	$1,200 00
A claim on the estate of C. C., deceased, in [Savannah, Ga.],	800 00
A claim for indemnity under the Treaty between the United States and , dated, &c.	2,000 00

Book Debts and Balances.

Due from the following persons: [*giving the items.*]

Dated, &c. J. D.

Witness, &c.

SCHEDULE B.

Referred to in the foregoing assignment.

Class Number One.

W. A. B., money deposited by him, as per receipt given,	$1,000
S. J., dividends on stock collected for her,	500
F. N., minor ward of J. D., legacy collected for her,	2,000

Class Number Two.

J. G., money borrowed of him, as per note dated, &c.	$1,500
M. E., money received for him, as per receipt	850
A. N., surety on J. D.'s bond to , dated, &c., conditioned for	2,000
E. P.'s indorsement of J. D.'s note, dated, &c., held by W. P.	1,000

Dated, &c. J. D.
Witness, &c.

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3. A General Assignment of Real and Personal Property, giving Preferences, without Schedules.

This indenture made the day of , in the year , between A. B., of , party of the first part, and C. D., of , party of the second part:

Whereas, &c. [*recital, as in preceding forms*].

Now, this indenture witnesseth that the said party of the first part, in consideration of the premises, and of the sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred, and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over, unto the said party of the

second part, his heirs, executors, administrators and assigns, all the estate, real and personal, goods, chattels, effects, debts, and choses in action of the said party of the first part, that is to say:

All that certain lot of land, situate, &c. [*describing it*].

One pair of horses and one carriage, now in the possession of G. H., of .

A bond executed by W. B., dated , and conditioned for the payment of one thousand dollars.

A promissory note for eight hundred dollars, dated , made by S. W., payable to the order of D. G., and by him indorsed.

To have and to hold the said above-described property, and every part and parcel thereof, unto the said party of the second part, his heirs, executors, administrators and assigns:

In trust, however, and to the uses, intents and purposes following, that is to say: that he, the said party of the second part, shall take possession of the said property, and with all reasonable diligence sell and dispose of the said lands and personal estate, and collect and recover the amount of the said bond and promissory note, and out of the moneys arising therefrom, after deducting the costs, charges and expenses of the said sales and collections, and other expenses attending the execution of this trust, and the lawful commissions of the said party of the second part, as a compensation for his services, shall pay and discharge the debts and liabilities of the said party of the first part, in the order and manner following, that is to say:

First. The said party of the second part shall pay in full to H. R., of , the amount of a promissory note held by him, dated , for [one thousand] dollars, made by the said party of the first part, and given for money borrowed by him of the said H. R., together with the interest thereon. And after fully paying and discharging the said debt, if there be any residue or surplus of the said moneys remaining,

Secondly. The said party of the second part shall pay in full to G. C. the amount of a promissory note held by him, dated , for [five hundred] dollars, made by the said party of the first part, and given for services rendered to him by the said G. C., together with the interest thereon. And after fully paying and discharging the said last-men-

tioned debt, if there be any residue or surplus of the said moneys remaining,

Thirdly. The said party of the second part shall distribute the said moneys among all the other creditors of the said party of the first part, ratably, and in proportion to their respective demands.

[1]*Lastly.* After paying all the costs, charges and expenses attending the execution of the trust hereby created, and after fully paying and discharging all the lawful debts due and owing by the said party of the first part, of any and every kind and description, if any part, &c. [*surplus to debtor, as in No.* 1].

And, &c. [*power of attorney, as in No.* 1].

And the said party of the second part [*covenant by assignee, if necessary, as in No.* 1].

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in presence of E. F. } A. B. [SEAL.] C. D. [SEAL.]

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4. A General Assignment, with Stipulation for a Release.

This deed, made this day of , A. D. 187 , by and between C. D. of , in the State of Maryland, of the first part, and H. C. of , in said State, trustee as hereinafter mentioned of the second part.

Whereas the said C. D. is indebted to sundry parties, in several and various sums of money, and is unable to pay the same in full, and has proposed and agreed to convey all of his property of every kind and description, unto the said H. C., for the benefit of his creditors as hereinafter mentioned:

Now this deed witnesseth, that for and in consideration of the premises, and of the sum of one dollar in hand paid to the said C. D., the said C. D. doth grant and convey unto the said H. C., his heirs, executors, administrators and

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[1] This is the form in use in Maryland. For a more extended form, see Moennel v. Murdock, 18 Md. 164.

assigns, all his property and estate, of every kind and description, real, personal, and mixed, and wheresoever situated or being, including herein all his stock in trade in the store known as No. on street, in said , and all his book accounts, bills, notes, choses in action, claims and demands of every kind, of him, the said C. D.

To have and to hold the same unto the said H. C., his heirs, personal representatives and assigns, in trust and special confidence, nevertheless, that is to say:

In trust that he shall, as soon as conveniently may be, make sale of so much of the said property as may be salable, for the best price that can be reasonably obtained for the same, and either at public or private sale, as he may deem most advantageous, and upon such notice, at such place or places, and upon such terms as the said trustee may think best for said trust, and to collect so much of the said property as is outstanding and collectible, and to take into his possession and custody all the property hereby conveyed to him; and upon the further trust, to dispose of the proceeds of said property, when the same shall have been sold, collected and reduced to his possession, in manner following, viz.:

First. To pay and reimburse himself all such reasonable costs, charges and expenses as may be incurred by him in the execution of this trust, together with such commissions to himself as shall be allowed to him by the Circuit Court of for the discharge of his duties as trustee hereunder.

Secondly. To apply the residue to the payment of all rents which may be due and unsatisfied at this date for the store aforesaid, and of all parts of said rent hereafter to become due, for which said trustee can be held liable; and,

Thirdly. To apply the residue of such proceeds to the payment of the claims of all the creditors of the said C. D., *pari passu*, and without any preference, who shall on or before the day of , 18 , agree to accept such dividend or dividends as they may severally be entitled to under this deed, in full satisfaction and discharge of their respective claims against the said C. D., and execute and deliver to the said C. D. a legal release thereof.

Fourthly. After the payment and satisfaction of the claims of creditors as aforesaid, then to apply the residue of the said trust property to the payment of all other creditors

of the said C. D., *pari passu*, and without any preference or priority; and after the payment of all the creditors of the said C. D. in full, to pay over the residue, if any, to the said C. D., his legal representatives or assigns. And the said C. D. doth hereby appoint the said H. C. trustee as aforesaid, and his successors in said trust, his true and lawful attorneys, to liquidate all accounts, and to collect all debts and sums of money due and owing to the said C. D., and acquittances and discharges to give therefor, and generally to do all acts requisite to be done in the premises, as fully as the said C. D. could do.

In witness, &c. C. D. [SEAL.]

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5. Copartnership Assignment. Assignment by Copartners without Preference.

This indenture, made this day of , in the year of our Lord one thousand eight hundred and , between of , and of , and of , who have hitherto composed the partnership of , hitherto doing business at , parties of the first part, and of , party of the second part, witnesseth, that, whereas the said parties of the first part are justly indebted to sundry persons in divers and sundry sums of money, and being unable to pay the same in full, are desirous of making an equitable distribution of their property and effects among their creditors: Now, therefore,

First. The parties of the first part, in consideration of the premises and the sum of one dollar to them in hand respectively paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, delivered and conveyed, and by these presents do grant, bargain, sell, assign, deliver over and convey unto the party of the second part, his successor or assigns, all and singular the estate and property, real and personal, of every kind and nature, and wheresoever the same may be, of the said parties of the first part, which is held or owned by them as such copartnership firm as aforesaid. To have and to hold the same, and every part and parcel thereof, with the appurtenances, to the said party of the second part, his successor or assigns.

In trust, nevertheless, for the following uses and purposes:

Second. The said party of the second part shall forthwith take possession of all and singular the estate, property and effects hereby above assigned, transferred and conveyed, and set over or intended so to be, and shall with all reasonable diligence sell and dispose of the same, and convert the same into money, and shall collect any and all bills, promissory notes, bonds, accounts, choses in action, claims, demands, and money due or owing to the said parties of the first part, as such copartnership, so far as the same shall prove collectible.

Third. Out of the proceeds of such sales, collections, and estate and property, the said party of the second part is authorized to pay and retain all reasonable costs, charges and expenses of making, executing and carrying into effect this assignment in this behalf, including a reasonable compensation to the party of the second part, for his services in executing and carrying out the trust created in this behalf in this assignment.

Fourth. That the said party of the second part is directed to pay out of the residue of the said proceeds of such sales, collections, estate and property, if these should be sufficient therefor, to each and every of the creditors of the said parties of the first part, as such partnership or firm, the full sum that may be justly due and owing to them respectively from such partnership or firm, without any priority or preference whatsoever: and, if the proceeds of such sales and collections, estates and property, shall not be sufficient to pay and satisfy the debts of each and all of the creditors of the said partnership or firm in full, then the said party of the second part is directed out of the proceeds to pay the said creditors ratably and in proportion to the amount due and owing to each of them respectively.

Fifth. With and out of the residue and remainder of the said proceeds, if any shall remain after paying all the said copartnership debts, the party of the second part is directed to pay and discharge all the private and individual debts of the parties of the first part, or either of them, whether due, or to grow due, provided the respective amounts of the individual debts of each of said parties does not exceed his portion of the surplus that may remain after paying all the said partnership debts; and if it should, then

his interest in said surplus is to be provided *pro rata* among his individual creditors in proportion to their respective demands, it being understood no part of the said surplus which will belong to each of said individual parties of the first part respectively, after the payment of the copartnership debts, is to be made liable for the individual debts of the other of them.

Sixth. And whereas the said parties of the first part are respectively justly indebted to sundry persons, in divers and sundry sums of money, and are respectively unable to pay the same in full, and are respectively desirous of making an equitable distribution of their property and effects among their creditors; Now, therefore,

Seventh. The parties of the first part, in consideration of the premises and of the sum of one dollar to each of them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have respectively granted, bargained sold, assigned, delivered over and conveyed, and by these presents do respectively grant, bargain, sell, assign, deliver over and convey unto the party of the second part, his successor or assigns, all and singular the estate and property, real and personal, of every kind and nature, and wheresoever the same may be, of the said parties of the first part, which is held and owned by them respectively as their separate and individual property, to have and to hold the same, and every part and parcel thereof, with the appurtenances, to the said party of the second part, his successor or assigns, in trust, nevertheless, to and for the following uses and purposes:

Eighth. The party of the second part shall forthwith take possession of all and singular the estate, property and effects hereby lastly above assigned and conveyed, or intended so to be, and shall with all reasonable diligence sell and dispose of the same, and convert the same into money, and shall collect any and all claims of every kind and nature hereby lastly above assigned, due or owing to the parties of the first part respectively, so far as the same shall prove collectible.

Ninth. Out of the estate, property and claims hereby lastly above assigned, or the proceeds thereof, the said party of the second part is authorized to pay and retain all reasonable costs, charges and expenses of carrying into effect this assignment in this behalf, including all reasonable compensa-

tion to the party of the second part for his services in executing and carrying out the trust in this behalf by this instrument.

Tenth. The party of the second part is directed out of the residue and remainder of said estate, property and proceeds, to pay and discharge all the private and individual debts of the parties of the first part, or either of them, whether due or to grow due, as follows: To apply and devote the estate, property and proceeds belonging to each of the said parties of the first part respectively, to the payment of his individual debts, so that no part of the estate, property or effects belonging to either of the parties of the first part individually shall be devoted or appropriated to the payment of the individual debts of the other of them.

Eleventh. If the individual estate or property of either or any of the parties of the first part shall be insufficient to pay his individual debts in full, then the party of the second part is directed to apply the same to the payment and liquidation of said debts ratably, share and share alike, according to their respective amounts, so far as the same will extend for the purpose.

Twelfth. If the individual property and estate of the parties of the first part, or any or either of them, shall be more than sufficient to pay their respective individual debts and liabilities, then any surplus that may remain is to be applied by the party of the second part to the payment and liquidation of any of the partnership debts, or any balance thereof which may remain unpaid out of the aforesaid partnership property and effects, said surplus to be applied to the payment and liquidation of said partnership debts ratably, share and share alike, according to their respective amounts.

Thirteenth. The parties of the first part hereby except from the foregoing assignment, and from the effect thereof, all such property as is by the laws of the State of New York and the laws of the United States of America, or otherwise, exempt to them, or any or either of them, from levy and sale under execution or otherwise for payment of debts.

Fourteenth. If any surplus shall remain of the property and estate hereby assigned, after the payment of all the just debts owing by the parties of the first part, or either of them, the party of the second part shall return the same to the

parties of the first part, their executors, administrators or assigns, according to their respective rights thereto.

And in furtherance of the premises, the said parties of the first part do hereby make, constitute and appoint the said party of the second part their true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts and demands due, owing and belonging to the said parties of the first part, or each or any of them, and to give acquittances and discharges for the same, to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances.

And the said parties of the first part do hereby authorize the party of the second part to sign the copartnership name of the parties of the first part to any check, draft, promissory note, or other instrument in writing for the payment of money, which is payable to the order of the parties of the first part in their copartnership name, and to sign the said copartnership name to any instrument in writing of any name, kind or nature, which may be necessary to more fully carry into effect the object, design and purpose of this trust; and the said parties of the first part respectively, in their individual capacity, do hereby make, constitute and appoint the party of the second part the attorney of each and every of them, and do hereby authorize him to sign the name of each or any of them to any check, draft, promissory note or other instrument in writing which is payable to the order of each or any of the parties of the first part, or to sign the name of each or any of the parties of the first part to any instrument in writing, whenever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with the said parties of the first part, that he will faithfully and without delay execute the trust created according to the best of his skill, knowledge and ability.

In witness whereof, the parties to these presents have

hereunto set their hands and seals the day and year first above written.

[SEAL.]
[SEAL.]
Sealed and delivered in presence of } [SEAL.]

[*Here insert Acknowledgment, as in Form No.* 1.]

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6. Assignment by Copartnership (shorter Form).

This indenture, made and entered into this day of , in the year one thousand eight hundred and eighty- , by and between of , and of , copartners doing business in the city of New York under the firm name of , parties of the first part, and of , party of the second part, witnesseth, that whereas the said parties of the first part are insolvent and unable to pay their debts in full or at maturity, and are desirous of providing for their payment by assigning all their property for that purpose: Now, therefore, the said parties of the first part, in consideration of the premises and of one dollar to each of them in hand paid by the said party of the second part, have granted, conveyed, bargained, sold, assigned, transferred and set over, and by these presents do grant, convey, bargain, sell, assign, transfer and set over unto the said party of the second part, all and singular their copartnership and individual estate, real and personal, goods, chattels, effects, credits, choses in action and property of every name and kind, whether held by and in the name of said parties of the first part and each or either of them, or by and in the name of any other person for them, except such property, if any, held or owned by said parties of the first part separately and individually, as is exempt by law from levy and sale under execution: To have and to hold the same, and every part thereof unto the said party of the second part, his successors and assigns, in trust, however, to take possession of the same, and to sell the same with all reasonable dispatch, and convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collections—

1. To pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and

of carrying into effect the trust hereby created, together with a lawful commission to the party of the second part for his services in executing said trust.

2. With and out of the net proceeds of the separate and individual property of each of the said parties of the first part to pay in full his separate and individual debts and liabilities. If the net proceeds of the separate and individual property of each or either of the said parties of the first part is insufficient to pay his separate and individual debts and liabilities in full, then the proceeds of the individual property of the said party of the first part so insufficient to pay his debts and liabilities in full shall be applied *pro rata* to the payment of the said party's separate and individual debts and liabilities. If, however, any surplus remains of the net proceeds of the said separate and individual property of either of the said parties of the first part after payment of his separate and individual debts and liabilities in full, the said surplus shall be applied towards the payment of the copartnership debts and liabilities of the said parties of the first part.

3. The net proceeds of the copartnership property, together with the surplus, if any, of the proceeds of the individual property of the said parties of the first part or either or each of them, shall be used in the payment in full of the copartnership debts and liabilities of the said parties of the first part. If, however, said proceeds are not sufficient for that purpose, then the same shall be applied *pro rata* to the payment of said copartnership debts and liabilities.

4. If any surplus shall remain of the property and estate hereby assigned, after the payment of all the just debts owing by the parties of the first part, the party of the second part shall return the same to the parties of the first part, their executors, administrators or assigns, according to their respective rights thereto.

[*Here insert power of attorney, as in Form No.* 1.]

[*Here insert acceptance by assignee, as in Form No.* 1.]

In witness whereof, the said parties to these presents have hereunto set their hands and seals the day and year first above written.

[SEAL.]

Sealed and delivered in presence of [SEAL.]

[SEAL.]

[*Here insert acknowledgment, as in Form No.* 1.]

7. An Assignment with Special Provisions as to the Employment of Agents, Hiring of Store, Insurance of Property, and Correction of Schedules.

This indenture, made the day of , in the year , [*as in the preceding forms, according to the case, to the end of the declaration of the trusts*].

And it is hereby provided and agreed between the parties to these presents, that the said party of the second part shall have power to appoint and employ all such agents, clerks and attorneys as may be necessary in and for the execution of the trusts hereby created, and to allow them a just and reasonable compensation for their services; and also to hire such places or storerooms as may be necessary for the proper and safe keeping of the property hereby assigned, or any part thereof, or for the proper execution of the said trusts; and also to keep the said property, or any part thereof, insured, until the same shall be sold and disposed of, as hereinbefore directed.

And it is hereby further provided that if any error or omission shall be found in the schedules hereto annexed, or either of them, the same shall be corrected and supplied by the said party of the second part, according to the fact.

And, &c. [*power of attorney, as in the preceding forms*].

In witness whereof, &c.

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8. An Assignment by a Bank, for the Payment of its Depositors and the Holders of its Notes, with Special Provisions as to Dividends.[1]

This indenture, made the seventh day of June, in the year of our Lord one thousand eight hundred and forty-one, by and between the president, directors, and company of the Bank of the United States, of the one part, and John Bacon, Alexander Symington, and Thomas Robins, of the other part:

Whereas, the said party of the first part are indebted to sundry persons, depositors in the said bank, and the branches

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[1] This assignment was held valid in Louisiana, in the case of The United States v. The Bank of the United States (8 Rob. 262), and in Kentucky, in the case of The Bank of the United States v. Huth (4 B. Mon. 423). See also the case of Hogg's Appeal, 22 Penn. St. 479.

or officers thereof; and also to sundry persons, holders of notes of the late Bank of the United States, incorporated by Congress; and to sundry persons, holders of notes of the present bank, being notes of the ordinary kind, payable on demand and commonly used in circulation; and also to sundry persons, holders of notes of the said bank, commonly called post-notes[1] (other than post-notes held by or issued to certain banks in the city and county of Philadelphia, for which security was provided and given by an indenture bearing date the first day of May, in the present year, and which are not intended to be provided for and embraced in the present indenture): And whereas the said party of the first part has resolved and agreed to provide an adequate security for the payment of the said deposits, and of the said notes, and of the said post-notes (save and except the said post-notes heretofore provided for, as above said), and of the interest to accrue upon them:

Now this indenture witnesseth, that the said party of the first part, as well for the consideration aforesaid as for and in consideration of the sum of one dollar to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof they do hereby acknowledge, have given, granted, bargained, sold, aliened, enfeoffed and delivered, assigned, transferred, and set over, and by these presents, do give, grant, bargain, sell, alien, enfeoff and deliver, assign, transfer, and set over, to the said party of the second part, all and singular the lands, tenements and hereditaments, goods, chattels, moneys, rights, credits and effects of the said party of the first part, contained, described, and set forth in a certain schedule hereto annexed, sealed with the seal of the said party of the first part, and bearing even date herewith, together with all deeds, papers and evidences following or relating thereto: To have and to hold all and singular the premises hereby given or granted, or intended so to be, to the said party of the second part, and the survivors and survivor of them, and the heirs, executors, administrators and

[1] See the case of Hogg's Appeal (22 Penn. St. 479), in which it was decided that the *post-notes* here meant and designed to be secured were such notes, payable at a future day, as were designed as a part of the circulating medium, and that the assignment did not include notes or obligations of the bank, under seal, payable at a future day in London, and being for £1,000 sterling, with interest, which were issued for a loan of money to the said bank, and which were not designed to be a part of the circulation of the bank.

assigns of the survivor, to and for their and his own use and benefit forever, as joint tenants, and not as tenants in common: In trust, nevertheless, to and for the following uses, purposes and trusts, and to and for no other use or purpose whatsoever, that is to say: in trust, in the first place, to enter upon the said real estate hereby granted, and to sell and dispose of, and to convey the same, in fee simple, or for any less estate, by public or private sale [for cash or on credit [1]], for the best price that can be had for the same, as may seem to them most expedient, and to give receipts for the purchase money, so that the purchaser or purchasers shall not be accountable for the application of the same; and in the meantime, and until a sale shall be made, to receive the rents, issues, and income of the said real estate, and to pay the charges thereon; and, in the next place, in trust to collect, receive, and get in all and singular the moneys due and owing to the said party of the first part, and hereby assigned, and the same as well as the proceeds of the said estate, safely to keep, to and for the uses and purposes hereinafter declared, that is to say:

Firstly. To pay and discharge all reasonable and necessary expenses, costs and charges attending the execution of this trust, in which, however, it is expressly understood and agreed that the commission charged by, or allowed to the trustees, shall not exceed one per centum upon the amount collected, nor amount to more than two thousand dollars in any one year, to each trustee.

Secondly. From time to time, as often as they shall have moneys on hand of sufficient amount for a dividend, to divide and distribute the same, ratably and equally, in and towards the payment of the said deposits, notes and post-notes (except the post-notes hereinbefore excepted), and the interest accrued thereon, so that all and each may participate ratably and alike in every such dividend, until the said deposits, notes and post-notes shall be fully paid off and discharged.

And in further trust, from and after the payment and discharge of the said deposits, notes and post-notes, and interest in full, to retransfer, convey and pay over to the said party of the first part, their successors and assigns, what-

[1] As to the effect of this clause in New York and other States, see *ante*, pp. 319, 332.

ever may remain of the premises hereby granted, and all moneys, credits and effects which may have been raised therefrom, or from any part thereof, and not applied to the purposes of the trusts herein and hereby created, together with all debts, papers, evidences and securities relating thereto.

Provided always, nevertheless, and it is hereby expressly declared, understood and agreed, as the condition of this indenture, and of the trusts therein and thereby created, that before the said trustees, their successors or assigns, shall proceed to make or declare any dividend of the moneys raised or collected as aforesaid, they shall give thirty days' notice of their intention to do so, in two or more daily newspapers of the city of Philadelphia, at least twice a week during the same period of thirty days, calling upon the claimants to come forward and prove their debts; and such dividend shall be declared and made only on the amounts so brought forward and proved; and no creditor shall be entitled to claim or receive such dividend who shall not have brought forwad and proved his debt before the time appointed for making and declaring the dividend. But if any dividend or dividends shall thereafter be made, such neglecting or defaulting creditor or creditors bringing forward and proving his or their claim or claims in time therefor, as aforesaid, shall be entitled to receive, in addition to such dividend, an amount equal to the rate of dividend or dividends which shall have been before made and paid, and so on from time to time, until a final dividend shall be declared and made; which final dividend, the said trustees, their successors and assigns, are hereby authorized and required to declare and make, whenever the moneys arising from the premises hereby granted and assigned shall, by the payment of the said final dividend, be disposed of and exhausted, or when all the creditors who have brought forward and proved their claims shall be paid in full, principal and interest; it being understood, however, that no interest shall be paid until the final dividend; and from and after such final dividend, no creditor shall have any claim upon the remaining fund, if any there be, nor upon the said trustees, their successors or assigns, for or by reason of these presents, or of the trusts herein and hereby created; but the same, except the trust for reconveying the surplus to the said party of the first part, their successors or assigns, shall thenceforth cease

and be determined and at an end. Provided also, and it is expressly understood and agreed, that if the said party of the first part, their successors or assigns, shall at any time pay off and discharge the said deposits, notes, post-notes (the said notes and post-notes being surrendered and canceled), then and from thenceforth the trusts herein and hereby created, or so much of them as shall then remain unexecuted, shall cease and be determined; and the whole of the trust property then remaining, be conveyed, transferred and delivered to the said party of the first part, their successors or assigns. And it is hereby expressly agreed by and between the parties to these presents, as a condition or part thereof, that the said trustees, their successors or assigns, shall not be answerable for the acts, omissions or defaults of each other, but only each for his own acts, omissions or defaults; and that they shall not be answerable for the misconduct, omissions or default of any agent or agents they may find it necessary to employ, being accountable only for the exercise of fair and reasonable skill and judgment, as well in the appointment of such agent or agents as in the general management of the trust hereby created, if the same be conducted in good faith and intention.

And the better to enable the said party of the second part, and the survivors and survivor of them, and the executors, and administrators of the survivor of them, to execute the said trusts, the said party of the first part do hereby constitute, make and appoint them their true and lawful attorneys and attorney irrevocable, in the premises, for them and in their name, but to and for the uses and purposes of this trust, and at the cost of the same, to ask, demand, sue for, and recover and receive all and every sums or sum of money due or to become due by reason of any matter or thing herein granted and assigned, or intended so to be, to give receipts and acquittances for the same, and generally to act and do as fully and effectually in the premises as they themselves might or could do; and substitute or substitutes one or more under them to nominate and appoint, and again at pleasure to revoke; hereby ratifying and confirming whatsoever they or their said substitutes or substitute may lawfully do in the premises.

It is understood that the foregoing indenture, or anything therein contained, is not in any manner to impair or affect the liabilities of the Bank of the United States, nor

the rights of depositors, or of the holders of the said notes and post-notes.

In witness whereof, the said parties have hereunto interchangeably set their hands and seals, the president, directors, and company of the Bank of the United States of the first part, acting by their President, William Drayton, Esquire, at Philadelphia, the day and year first above written.

W. DRAYTON, President.

Signed, sealed and delivered, in the presence of us,
T. S. TAYLOR.
G. W. FAIRMAN.

{ SEAL OF THE BANK. }

Attest, T. S. TAYLOR, Cashier.

We accept the trust created by the above indenture of assignment.

JOHN BACON. [L. S.]
A. SYMINGTON. [L. S.]
THOMAS ROBINS. [L. S.]

[*Schedule.*]

II. ASSIGNMENT BY DEED POLL.

9. A General Assignment for the Benefit of Creditors Ratably, with Schedules.

Know all men by these presents, that I, A. B., of , in consideration of the sum of one dollar to me paid by C. D., of , the receipt whereof I hereby acknowledge, and of the uses, purposes and trusts hereinafter mentioned, have granted, bargained and sold, assigned, transferred and set over, and by these presents do grant, bargain and sell, assign, transfer and set over, unto the said C. D., his heirs and assigns, all my lands, tenements and hereditaments, goods, chattels and effects, and all accounts, debts and demands due, owing or belonging to me, together with all securities for the same, which said lands, goods, chattels, debts and demands are particularly enumerated and described in a schedule hereunto annexed, marked "Schedule A."

To have and to hold the same, with the appurtenances, unto the said C. D., his heirs, executors, administrators and assigns:

In trust, nevertheless, that the said C. D. shall forthwith take possession of the premises hereby assigned, and with all reasonable diligence sell and dispose of the same, by public or private sale, for the best price that can be obtained, and convert the same into money: and shall as soon as possible, collect the debts, accounts and demands aforesaid: and with and out of the proceeds of such sales and collections, after deducting and paying all reasonable costs, charges and expenses attending the execution of the trust hereby created, together with a reasonable and lawful compensation to the said C. D., shall pay to each and every of my creditors (a full list of whom, with the amount due to each, is contained in a schedule hereunto annexed, marked "Schedule B."), the full sum that may be due and owing to them from me. And if the proceeds of the said sales and collections shall not be sufficient fully to pay and satisfy each and all of my said creditors, then the said C. D. shall, with and out of the said proceeds, pay the said creditors, ratably and in proportion to the amount due and owing to each. And if, after fully paying all the said creditors, there shall be any balance or residue left of the said proceeds, the said C. D. shall pay and return the same to me, the said A. B.

And, in furtherance of the premises, I, the said A. B., do hereby make, constitute and appoint the said C. D. my true and lawful attorney irrevocable, with full power and authority to do all acts and things which may be necessary in the premises, and to the full execution of the said trust; and for the purposes aforesaid, to ask, demand, recover and receive of and from all and every person and persons, all the property, debts and demands due, owing and belonging to me, and to give acquittances and discharges for the same; and in default of delivery or payment in the premises, to sue, prosecute and implead for the same, and to execute, acknowledge and deliver all necessary deeds and instruments of conveyance, and also for the purposes aforesaid, or any part thereof, to make, constitute and appoint one or more attorneys under him, and at his pleasure to revoke the same—hereby ratifying and confirming whatever my said

attorney or his substitutes shall lawfully do in the premises.

In witness whereof, I have hereunto set my hand and seal, the day of , in the year .

Sealed and delivered in presence of } A. B. [SEAL.]

E. F.

[*Schedules, as in preceding forms.*]

III. ASSIGNMENTS BY INDENTURE TRIPARTITE.

10. A General Assignment for the Benefit of Creditors, with Preferences to such as become Parties, and with Covenant of Release by Creditors.

This indenture, made this day of , in the year , between A. B., of , merchant, of the first part; C. D., of , esquire, of the second part; and the several persons, creditors of the said A. B., who have executed these presents, or who shall within days from the date hereof execute the same, of the third part:

Whereas the said party of the first part is at present unable to pay all his just debts, and hath agreed to convey and assign all his estate, real, personal and mixed, to the said party of the second part, in trust for the benefit of all his creditors, in manner hereinafter mentioned:

Now, this indenture witnesseth that the said party of the first part, in consideration of the premises, and of one dollar to him paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, assigned, transferred and set over, and by these presents doth grant, bargain, sell, assign, transfer and set over, unto the said party of the second part, his heirs, executors, administrators and assigns, all, &c. [*describing the property, with reference to a schedule annexed, as in the preceding forms*].

To have and to hold the same, and every part and parcel

thereof, with the appurtenances, unto the said party of the second part, his heirs, executors, administrators and assigns:

In trust, nevertheless, that he, the said party of the second part shall forthwith take possession of the premises and property hereby assigned, and shall, with all reasonable diligence, sell and dispose of all and singular the estate, goods and effects in the said schedule mentioned, and collect all and singular the debts, sum and sums of money now due and owing to the said party of the first part, according to the said schedule; and after deducting and retaining the costs, charges and expenses of preparing and executing these presents, and of executing the trusts hereby created (including a reasonable compensation to the said party of the second part for his services), then,

Upon trust, that the said party of the second part shall pay and apply the moneys arising from said sales and collections in manner following, that is to say:

First. Shall pay and discharge in equal proportions the debts due respectively to such of the creditors of the said party of the first part, enumerated and mentioned in a schedule hereunto annexed, marked "Schedule B," who shall have signed and sealed these presents. And after fully satisfying and discharging the said debts, out of the residue of said moneys (if any there shall be),

Secondly. Shall pay and discharge the debts due to all the other creditors of the said party of the first part, in equal proportions. And after fully satisfying and discharging all the said debts,

Lastly. Shall pay over the surplus of said moneys (if any) to the said party of the first part, his executors, administrators or assigns.

And the said party of the first part [*power of attorney*].

And the said party of the first part, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree, to and with the said party of the second part, his executors and administrators, that he, the said party of the first part, shall not, nor will, in any manner, release or discharge any rights, debts, demands or credits due, owing or belonging to him, nor in any way obstruct or hinder the said party of the second part, his [&c.] in the recovering, receiving or getting in of the same, and that he, the said party of the first part, will ratify and confirm whatsoever the said party of the second part, or his [&c.] may or shall do

in the premises by virtue hereof; and further, that the said party of the first part shall and will, at the costs and charges of the creditors aforesaid [*or*, at his own charges], from time to time make, do and execute all and every such further acts, matters and things for the better and further assigning and assuring of all and singular the premises to and for the trusts and purposes aforesaid, as by the said party of the second part, or his counsel learned in the law, shall be reasonably advised and required; and further, that he, the said party of the first part, his [&c.] shall and will from time to time, as occasion may require, upon reasonable request, and notice to him by the said party of the second part, his [&c.] given, assist him and them in making up his accounts, and in getting in the said debts, &c., according to the best of his ability.

And the said party of the second part for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said party of the first part, his executors, administrators and assigns, and also to and with the said parties of the third part, that he, the said party of the second part, shall and will use his best endeavors to sell and dispose of the property, estate and effects hereby assigned, for the best prices and on the best terms that can be obtained for the same, and to collect and receive such sums of money as are due to the said party of the first part, as soon as may be, and to pay and distribute all such moneys as he shall receive from such sales and collections, to and among the creditors of the said party of the first part, according to the true intent and meaning of these presents; and generally, that he will execute and fulfill the trusts hereby created and declared, to the best of his skill, knowledge and ability.

And the said parties of the third part, each for himself and themselves, and for their respective executors, administrators, assigns and copartners in business, in consideration of the conveyances, covenants and conditions herein made and provided on behalf of the parties hereto of the first and second parts, do accept the said assignment and the payments and dividends that they may respectively receive under and by force of the same, in full satisfaction and discharge of all and singular their several and respective claims and demands against the said party of the first part, whether the same are now due or not due; and of all claims and

demands which they, as aforesaid, may hereafter have on the said party of the first part, in consequence of any present existing acceptance, indorsement, suretyship, or liability, by them respectively made or assumed for his account. And in consideration of the premises, they do severally, as aforesaid, release and discharge the said party of the first part, his heirs, executors and administrators, of and from all and singular the demands which they, or any or either of them, now have or by possibility may hereafter have against him, the said party of the first part, or his legal representatives.

In witness whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in presence of
E. P.
R. L.

A. B. [SEAL.]
C. D. [SEAL.]
N. C. [SEAL.]
J. T. [SEAL.]
H. S. [SEAL.]
and other creditors.

[*Add schedules, as in preceding forms.*]

IV. INVENTORY, BOND AND NOTICE TO CREDITORS.[1]

11. Title to Inventory.

The following is a full and true inventory of all the estate, both real and personal, of the copartnership firm of C. B. & Co., in law and equity, and the incumbrances existing thereon, and all the vouchers and securities relating thereto, and the value of such estate, according to the best knowledge and belief of the individuals composing said copartnership.

[1] The following forms are those in use in the State of New York, under the statute of 1860. See Bishop on Insolvent Debtors.

No. 19.—Inventory.

Description of property and where situated.	Incumbrances.	Estimated market value above all incumbrances.	Vouchers and Securities.

No. 13.—Schedules.

Name of Creditor.	Residence.	Amount due to Creditor, and Nature thereof.	Consideration of Indebtedness, and when contracted.	Judgment, Mortgage, Collateral, or other Security for Indebtedness.

No. 14.—Classification.

Name of Debtor.	Amount of Claim.	Good.	Doubtful.	Bad.	Remarks.

15. Affidavit to Inventory and Schedules.

STATE OF NEW YORK,
City and County of New York, } ss.:

A. B., of , and C. D., of , copartners, members of the copartnership firm of A. B. & Co., doing business in the city of New York, being severally sworn, say, and each of them for himself says, that he has read the foregoing inventory and schedules, and that the same are in all respects just and true according to the best of his knowledge and belief.

Sworn to before me this
day of 188 .

---

16. Indorsement by Judge.

STATE OF NEW YORK,
City and County of New York, } ss.:

The foregoing inventory and schedule of and concerning the assigned estate of Messrs. A. B. & Co., duly verified, was this day duly delivered to me, the undersigned, one of the judges of the Court of Common Pleas, of the city and county of New York, sitting at Chambers, in pursuance of the statute in such case made and provided.

Dated this day of
, A. D. 188 .

---

17. Affidavit to obtain Order fixing the Penalty of the Bond where Schedules have not been filed.

COURT OF COMMON PLEAS,

FOR THE CITY AND COUNTY OF NEW YORK.

In the matter of the general assignment of A. B. to C. D. for the benefit of creditors.

City and County of New York, ss.:

, being duly sworn, says, that on the day of , 188 , A. B., of the city of New York,

did make an assignment of all his property for the benefit of his creditors to C. D., in due form of law, which said assignment was on the day of , duly recorded in the office of the clerk of the city and county of New York; that more than twenty days have elapsed since the recording of said assignment, and that the said A. B. has neglected and omitted to file an inventory and schedule of his estate and liabilities, as required by law, and that no such inventory and schedules have been filed herein, for the reason [*state the reasons which delay the preparation of schedules*]; that the said C. D., the assignee as aforesaid, is desirous of giving the bond required by statute before the filing of said inventory and schedules, for the reasons [*state the reasons, the property being perishable or other reason, why the property should be sold*]; that deponent has examined the books of account of the said A. B., and from such examination it appears that the debts and liabilities of the said A. B. amount to the sum of dollars; that the property conveyed to deponent by said assignment consists of [*here state the character of the property assigned*]; and that the value of the same is dollars, and that the demands due to the said A. B., as appears from said books of account, amount to the sum of dollars; that many of said demands are uncollectible, and that the actual value of said demands does not exceed the sum of dollars.

Sworn to before me this day of , 188 .

---

18. Order fixing Penalty of Bond before Schedules are filed.

COURT OF COMMON PLEAS,

FOR THE CITY AND COUNTY OF NEW YORK.

In the matter of the general assignment of A. B. to C. D. for the benefit of creditors.

Upon the annexed affidavit of , and on application of C. D., assignee of the above named A. B., let C. D., the assignee above named, give a bond in the penalty of

dollars, with sufficient sureties, to be approved by a judge of this court, to the people of the State of New York, or their assigns, for the faithful performance and discharge of the duties of the said C. D. as assignee as aforesaid.

Dated New York, , 188 .

---

19. Assignee's Bond on Assignment.

Know all men by these presents, that we, residing at No. , in the , and , residing at No. , in the , and , residing at No. , in the , are held and firmly bound unto the people of the State of New York, and their assigns, in the sum of dollars, lawful money of the United States of America, to be paid to the said people, or their assigns; for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals.

Dated the day of , one thousand eight hundred and .

Whereas ha made an assignment of property, in trust to the above bounden for the benefit of creditors, dated the day of , one thousand eight hundred and , recorded on the day of , 18 , in the office of the clerk of the county of .

Now, therefore, the condition of this obligation is such, that if the above bounden shall faithfully execute and discharge the duties of such assignee, and duly account for all moneys received by him as such assignee, then this obligation to be void, else to remain in full force and virtue.

[SEAL.]
[SEAL.]
[SEAL.]

Sealed and delivered in the presence of

County of , ss.:

, one of the sureties to the foregoing bond, being duly sworn, says, that he is a resident and holder within this State, and is worth the sum of dollars, over

all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me this
. day of , 18 .

County of , ss.:

, one of the sureties to the foregoing bond, being duly sworn, says, that he is a resident and . holder within this State, and is worth the sum of dollars, over all his debts and liabilities, and exclusive of property exempt by law from execution.

Sworn to before me this
day of , 18 .

ss.:

I certify, that on this day of , 18 , before me personally appeared the within named , known to me to be the individuals described in and who executed the within bond, and severally acknowledged that they executed the same.

I hereby approve of the within bond and of the sufficiency of the sureties therein.

[*Signature of county judge, or judge of Court of Common Pleas, with title of office.*]

---

20. Affidavit to obtain Order authorizing Assignee to Advertise for Claims.

COURT OF COMMON PLEAS,

FOR THE CITY AND COUNTY OF NEW YORK.

In the matter of the general assignment of A. B. to C. D., for the benefit of creditors.

City and County of New York, ss.:

C. D., being duly sworn, says, that on the day of , 188 , A. B., above named, made and executed, in due form of law, a general assignment of all his property to de-

ponent, as assignee, for the benefit of his creditors, which said assignment was, on the day of duly recorded in the office of the clerk of the city and county of New York, where said A. B. then resided and still resides; that a bond on the part of deponent as such assignee, approved by one of the judges of this court, was on the day of duly filed, and that deponent has accepted said trust, and entered upon the discharge of his duties as such assignee.

Deponent further says [that none of the creditors of the said A. B., entitled to share in the distribution of the said trust estate, reside out of the State of New York], *or* [that deponent has reason to believe that certain of the creditors of the said A. B., entitled to share in the distribution of said estate, reside out of the State of New York].

Sworn to before me this day of , 18 . } C. D.

---

21. Order of Publication of Notice to Creditors.

COURT OF COMMON PLEAS,

FOR THE CITY AND COUNTY OF NEW YORK.

[*Title as above.*]

On the annexed affidavit of C. D., and on application of C. D., assignee of the estate of A. B., in trust for the benefit of the creditors of said A. B., and it appearing to my satisfaction [that none of the creditors of the said A. B., entitled to share in the distribution of the said trust estate, reside out of the State of New York], *or* [that certain of the creditors of the said A. B., entitled to share in the distribution of the said trust estate, reside out of the State of New York]:

Ordered, that the said C. D., assignee of the said trust estate, be and he hereby is authorized and empowered to advertise by publication for creditors to present to him their claims against the said A. B., with the vouchers duly verified, on or before a day to be specified in said advertisement or notice, not less than three months from the date of the first publication of such notice, which said advertisement or notice shall be published once in each week for four successive weeks, in the newspaper, published in the county of , where said assignment was made [*and where cred-*

itors reside out of the State, add], and also once in each week, for six successive weeks, in the , the official newspaper of this State.

[This order should be signed by the county judge or judge of Court of Common Pleas, and filed in the office of the clerk of the county where the assignment is recorded.]

---

22. Notice to Creditors.

In pursuance of an order of Hon. , county judge of county [*or* one of the judges of the Court of Common Pleas for the city and county of New York], notice is hereby given to all persons having claims against [*assignors*], lately doing business in the city of New York under the firm name of , to present the same, with the vouchers thereof duly verified, to the subscriber [*assignee*], who has been duly appointed assignee of said [*assignor*], for the benefit of their creditors, at his office, No. , in the city of New York, on or before the day of , 188 .

Dated New York, the day of , 188.

Assignee.

[The day named in the notice must be not less than three months from the date of the first publication.]

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GENERAL INDEX.

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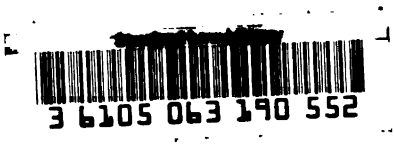
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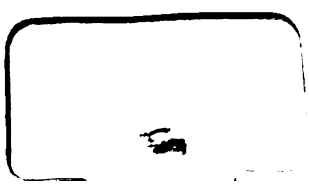

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